CUSTODY OF CHILDREN UNDER DIFFERENT LEGAL SYSTEMS: A COMPARATIVE STUDY

ABSTRACT

OF THE

THESIS

SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy

IN

LAW

BY

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UNDER THE SUPERVISION OF

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ALIGARH - 202002 [INDIA]

2013

ABSTRACT

STATEMENT OF THE PROBLEM

Marriages in India are very sacred and considered to be once in a lifetime affair. The marriage occasion is an integral part of social traditions and rituals in which both sides' family members get involved very emotionally and their community members participate to give blessings for a happy married life. In recent times, increasing number of married couples is experiencing distress and incompatibilities. Due to various socio-economic factors, there is a rapid rise in discontent marriages in India as a result of which, the rate of divorces and separations have gone up. By this unpredictable social disaster, the family courts and other courts, police administration and various Counseling Cells are feeling helpless due to sudden rise in of matrimonial problems related cases such as custody of children. Today custody of children is debatable question in India as well as globally. In this study attempt has been made to critically analyze the existing laws under various religious and secular laws.

Child custody and guardianship are legal terms which are sometimes used to describe the legal and practical relationship between a parent and his or her child, such as the right of the parent to make decisions for the child, and the parent's duty to care for the child. The religion-based distinction of the personal laws is an evident and accepted fact. These laws are zealously guarded, fiercely protected and justified by the various religious communities. Both mothers and fathers have a prominent role to play in supporting the growth and development of their children. The basic opinion of the child and the mother is highly ignored while determining the custody of the child. As a father earns more than a mother, it does not entitle him to get the custody of the child in the event of a divorce This situation is changing in recent cases where child custody is being awarded to the parent keeping in view the best interests of the child.

In the social conditions that exist today it is necessary that parents must regard as their foremost responsibility to bring up their children as healthy, happy and useful individuals of an all round standard of education and as active builders of society. The purpose, therefore, of the law of the guardianship should be to ensure this development of the child and to safeguards its interest. This can be done only in the appointment of the guardian of a minor, the welfare of the minor is, made the first and paramount consideration and no other consideration, such as the superiority of the mother or father is taken into account. In divorce proceedings the matter of custody is the most complex and drenching issue which creates social, religious, economic, educational and legal problems in the society. Social problem in the sense child should be protected from human evil i.e. child cannot indulge in juvenile offences and social evil i.e. he or she may be grown up as a human beings in the society. It is the mother who primarily has given the company to her children in his/her tender age. Our religious laws have given superiority to the mother in comparison to the father in relation of the child. In all religious laws i.e. under Muslim law, Hindu law, Christian law, Parsi law child up to tender age remains under the custody of mother but after the expiry of that period the custody shifted to the father. Custody of child is an economic problem in the sense of awarding the custody of the child the court will see that who will give more financial support to the child because during these formative years the child needs more money for upbringing and for his/her education. Therefore court often gives custody to the mother but obligation to maintain his child remains with the father. Custody of children is a legal problem in the sense; court has given more concern towards the welfare of the child. Legal rights of the parties or parents are subordinate to the welfare of the child and therefore rule of father's supremacy is overruled by the welfare theory.

But before Independence there was no law which has given equal rights to the mother vis-à-vis father relating to the child's matters. The Guardians and Wards Act 1890 also has given superiority to the father in matters of guardianship and

custody. According to section 19 (b) of Guardian and Wards Act, 1890 "Nothing in this chapter i.e. appointment and declaration of guardian shall authorize the court to appoint or to declare a guardian of the property of a minor whose property is under the superintendence of a court of wards or to appoint or to declare a guardian of a minor, whose father is living and is not in the opinion of the court unfit". This provision retreated traditional concept of superiority of men over woman.

After Independence woman's organization have been demanding equal rights. The legislature and judiciary have also shown awareness towards there respective domain. Several legislative measures have been adopted to give equal right to the mother *vis-a-vis* father. But there are still areas where individual discrimination continues to exist. Similarly section 6 of Hindu Minority and Guardianship Act, 1956 also assigned a subservient position to the mother as natural guardian. Section 6 of Hindu Minority and Guardianship Act, 1956 states that the natural guardian of Hindu minor, in respect of the minor's person as well as in respect of minor's property in case of a boy or unmarried girl, the father and after him the mother, provided that the custody of a minor who has not completed the age of 5 years shall with the mother. Superior position of father also shows by this section. The question arises whether the preference to the father as against the mother notwithstanding the welfare principle is justified in the light of the provision of the constitution which states that not to discriminate against any citizen on grounds of religion, race, cast, sex, place of birth or any one of them? Is it correct to give preference to the father as against the mother keeping in mind the fact that it is the mother who suffers physical discomforts for nearly nine month even before the birth of the child? Should mother even so be considered less suitable in matters of custody mainly on account of her gender? The fact that a woman/mother continues to be treated unequal in terms *vis-à-vis* a man/father in regard to matter of custody it provides the necessary justification for considering the law of the subject and analyses whether our religious laws have been given justice to a woman/mothers in relation to the custody of the children? However due to inadequate legal provisions

the courts often tends to recourse to the phrase "welfare of the child " which has been differently interpreted by the courts in different situations.

The impact of globalization also affects the matrimonial relationship. It has increased the competition there by an extra pressure up on the parents/parties. Moreover the social system of the society has undergone a huge change where the nuclear family system has replaced the joint family system. This also further increased the burden on the parents, therefore no one to look after household affairs in their absence. Economic independence of the women/mother also creates a situation which often results in marriage breakdown. Ultimately this leads to the adverse affect on the development of the children. Children cannot live with both the parents. Therefore the problem of custody of child/children arises.

Child custody is the word which we usually hear in family courts, when the spouses are taking the divorce and fighting for the physical custody of their child. The child custody is the custody of the children who is below the age of 18 years. The matter of child custody comes in front of the court when there is a divorce or annulment of the marriage. Family law courts generally based on the Best Interest Theory of the child or children, not always on the best arguments of each parents. In India there are two types of custody (1) Legal custody, (2) Physical custody. Legal custody means that either parent can make decisions which affect the welfare of the child, such as medical treatments, religious practices and insurance claims. Physical custody means that one parent is held primarily responsible for the child's housing, educational needs and food.

Since in India there are many religions so we have many personal laws. Thus, in the matter of child custody we follow the personal laws of their respective religions. Under Muslim law the custody of a child is given to the mother this right is called as right of Hizanat. But it is not an absolute right, since it is made in the interest of the child. The custody can be given to the father if the mother disqualify for the custody. Under Hindu Law, the Guardian and Wards Act 1890 and Hindu Minority and Guardianship Act, 1956 deals with the issues of custody of a child.

These Acts are to be read together and implemented into the matter of child custody and appointment of guardian for the minor. The Law Commission on Guardian and Wards Act 1890 in its 83rd report has made various recommendations to remove gender discrimination in this respect and had also laid guidelines for the courts. It recommends equal rights of guardianship and custody and also gives some suggestions regarding the custody of children in persuasion of above recommendations. In 2010, the Personal Law (amendment) Bill has been passed with some modification of Guardian and Wards Act 1890, according to which Section 19(b) include mother along with the father for the purpose of removing gender in- equality. Similarly 133rd Law Commission Report upon 'Removal of Discrimination against Women in matters relating to Guardianship and custody of minor children and elaboration of welfare principle also gave same and equal powers in respect of custody to the mother. The Hindu Minority and Guardianship Act 1956, contain a provision which lay down that custody of a child up to the age of five years should ordinarily be with the mother. Under Christian Laws, there is no separate Act for the custody of the child. They also follow Guardian and Wards Act 1890, the Indian Divorce Act 1869, applicable to all religion. Under Parsi Law, the custody of child is provided in Section 49, of Parsi Marriage and Divorce Act, 1936.

Under English Law the Act of 1925 give ample power to the mother regarding the custody of child. Further, the Children Act of 1989 also gives importance to the Child's Welfare Theory. According to the Act, child's welfare is to be paramount while deciding the matter of custody of children. The Children Act of 2004 also emphasizes upon the Welfare Theory of the child. Therefore, the history of legislative development relating to minor's custody in India as well as in England has shown, that under both the countries legislature, try to follow the model i.e. social, moral, and ethical, economics and educational interest of the child should be protected.

The problem of child marriage in India is a complex one because of religious traditions, social practices, economic factors and blind beliefs. It is

worthwhile, to highlight important legislative measures taken in the last century to reduce early marriages in India. It is not entirely correct to assume that early marriage and early pregnancy enjoyed complete social approval in the pre-independence era. There are three main laws dealing with the issue of child marriage in India: *The Child Marriage (Restraint) Act,* 1929, The Prevention of Child Marriage Act, 2004 and The Prohibition of Child Marriage Act, 2006.The most laudable legislative measure, which is closer to people's aspirations, was the Child Marriage Restraint Act (CMRA), passed in 1929 that aimed at preventing child marriages. It must be highlighted that no matter how many amendments are made in the law, it can only be effective if it is enforced in its true spirit. So we must put our faith in the judiciary system and the government to implement them and put an end to this disastrous tradition. With the amendment in the law and its due application it is hoped that we shall at last be able to free our society of the demon called child marriage. These marriages create the problem of custody of minor wife. According to the religious laws, the custody of a minor wife remain with her mother or her parents for some time. But according to the legislative laws custody of minor wife should be with the husband judicial trend also highlight that custody of a minor wife should be granted to the best fitted person or according to the wishes or welfare of the minor. Moreover the child born form this wedlock would be legitimate and their custody should be granted by the court according to the welfare of the child.

The trend of judiciary relating to custody of child and its best interest reflects that welfare of children is a paramount consideration for conferring custody between father and mother, though section 13(1) of the Hindu Minority and Guardianship Act, 1956 has recognized that in case of declaration of any person a guardian of Hindu minor by court, the welfare of the children shall be the paramount consideration. In the same way when in matrimonial proceeding under the Hindu Marriage Act 1955 spouses demands the custody of the children under section 26 of the Act through court, the court should not restrictly adhere to the priority of the father's claim of custody over mother's claims. The court should consider not only the economic position of the parent but the interest and welfare

of the child should be taken into account. The welfare is neither define nor illustrated in the Act. Whenever, the welfare of the children has been considered as paramount the courts everywhere raised a presumption in favors of mother. Similar attitude has been reflected through the English Case Law. In most of the cases the Indian courts relied on English doctrine. But sometimes Indian courts follow their own religious or secular laws. In some cases, deviation from English laws and application of equity and justice and impact of globalization is also seen in the decision of the Indian court's recent judgments.

The child's economic as well as educational interest is protected by our judiciary has been given judgment on the issue of protection of Child's social economic interest. It is the interest of the child which is supreme not the right of the parent. All other considerations are sub ordinate to the well being of the minor. Similar attitude has also been shown in the matter of custody of NRI child's case. It is also seen that child's welfare should be considered impartment. Although, India is not a signatory of Hague Convention of 1989 but the most urgent need of time is to evolve a concrete domestic frame work of law dealing with child custody in NRI case.

AIM OF THE RESEARCH

The aim of the research is to examine the position of child custody under various religious laws in India. As well as mother's position in child custody a comparative approach is examining who is entitled to the custody after the mother or the father under Muslim Law, Hindu Law, Christian Law and Parsi Law. The objective of the study is to find out the historical background of the legislative development of custody in India and England. The study further emphasize upon development and welfare of child custody in India and England and to assess and evaluate the role of judiciary in the cases of custody of child. The study further examines the protection of educational, economic interest of the child in India. This study seeks to examine various issues emerging in recent years at National and International level like position of Non Resident Indians child custody.

HYPOTHESIS

Hypothesis means an idea or general opinion to be defended by a researcher and find out a new theory and new models put to test to determine its applicability, impact on the society and its legitimacy. The present researcher has formulated the following hypothesis.

- The conflict between the religious laws and secular laws in India to protect the socio-economic interest of the child in custody matters.
- The working of the legislation, Act and regulation are sufficient to provide the equal opportunity to the mother in cases of to protect the child's interest. Is there any need of amendments in these Acts?
- Whether the approach of judiciary is traditional or pragmatic and formulated criteria to protect the interest of child since with the growth of globalization and technological development, sometime the court deviated from the religious law in the name of equity, justice and good consciousness. Whether there is need of uniform law on custody of child?
- Today the Non Residential Indians (NRI) child custody problem is a debatable area of matrimonial laws?

RESEARCH METHODOLOGY

The Present study will be descriptive and analytical study. The legal literature for the study will be collected from various sources. The present work depends heavily on the book reviews both of national and international, religious ancient texts both of Hindu laws and Muslims laws, government reports, law journals and periodicals articles, research papers, news papers, law commission reports in judicial decisions and various other primary and secondary sources. The researcher has also used various internet website to collect the information rating to the subject of study. To make the finding of the study to reach at the meaning full conclusion and attempt will also be made to discuss, examine, analyze and critically

evaluate different provisions of the enacted laws, conventions at national and international level. Secondary sources include books, law journal, magazines, newspapers, and news letters etc. it is also pertinent to mention here that helps of various libraries particularly A.M.U law library, Indian law Institute(ILI), Delhi University Law library, A.M.U. Theology and Islamic studies library is taken.

The study is organize into seven chapters

Chapter-1: Custody of a child under different religious laws. This chapter deals with custody of children under four religious laws i.e. Muslim, Hindu, Christian and Parsi Laws.

Chapter-2: Dealt with custody of children: Legislative Development on Guardianship and Custody in India and England. This chapter talks about the Historical aspect of guardianship and custody laws in India and England. In this chapter the researcher has critically analyzed the genesis of the Act of 1956 on guardianship and custody of children. An analysis of Acts and Regulations which are responsible for the emergence of the concept of the custody of child laws in India and England.

Chapter-3: Custody of Minor Wife: Some Legal Issues. In this chapter the researcher highlights that the ill effect of child marriage on the society on legislative position relating to minor married girl and also discussed after passing the prohibition of child marriage Act 2006 who is entitled to the custody of minor married girl or wife. Either the husband or her parents and discussed the recent case on this issue. The researcher critically examines the recent Madras High Court Judgment in which the Madras High Court has given wider interpretation of Section6 of Hindu Minority and Guardianship Act 1956 and cropped out number issues.

Chapter-4: Development of Doctrine of Best Interest Theory/Welfare Theory in England and India. This chapter has divided into two parts. Part I devoted to the statutory provisions and judicial decisions of English Court in which the court has given more emphasis on social, moral and economic rights of the child. In part II deals with the development of doctrine of Best interest theory in India in which the researcher lays emphasis also on Law Commission 83rd and 133rd report. Hindu Minority and Guardianship Act of 1956 and Guardian and Wards Act 1890. And also discuss case law on the child welfare theory.

Chapter-5: Protection Social/Economic rights of child: This chapter deals with the socio economic protection of rights under Guardian and Wards Act 1890, Hindu Minority and Guardianship Act 1956, Prohibition of Child Marriage Act 2006 and protection under Non Resident Indian Laws.

Chapter-6: Non-Resident Indian (NRI) child's custody some issues: In this chapter the researcher has a critically highlight the problems of Non Resident Indians (NRI) child custody. This problem has direct impact of the migration of Indians parents to develop countries. In this chapter the researcher has discussed the jurisdiction of the court, recognition of foreign judgments particularly relating to the NRI children. And judicial attitude of Indians Courts regarding the custody of Non Resident Indians children.

The work ends with conclusion and has been concluded with some suggestions.

CONCLUSION AND SUGGESTIONS

After Analyzing various religious laws relating to the custody of a child and legislative laws in India as well as in England, Law Commissions Report, and case law it is obvious that all laws are made for the welfare and protection of child's

interest. Although there is urgent need to be made clear that court must make some guidelines to implement the concept of the best interest of the child. It is also necessary that the interest of children must not be limited to their material need but has to be quite comprehensive one, taking into its stride social moral, aesthetic, and psycho-analytical norms pertaining to them. This doctrine should get reflected in all walks of life, especially in the case of gender justice and welfare of the female child to usher in the welfare of the society as a whole. The law Commission of India reflected that mother should have same and equal right vis-à-vis father.

From the above discussion it is summed up that the statuary provisions are hesitant to confer the absolute right of custody to the mother love and affection as well as the care for health of the child is better rendered by the mother though the father can provide better direction so as to the course of education except in exceptional circumstances. So it is judiciary who should have to play the role of a realist judge. Thus welfare theory seems to be the dominant factor in ascertaining the interest of a child in the arena of modern welfare society. Indian courts have made the principle of best interest as the rule of court and try to follow it as efficiently a possible, but the concept itself being a relative one, it leaves as lot of scope for its misuse. The interest of a child cannot be crystallized in concrete terms, so the welfare of children gets glossed over which needs to be arrested, order to achieve the welfare of child in letter and spirit.

SUGGESTIONS

It is suggested that:

(1) Religious principles be made with suitable fine tuning to achieve the social, moral, ethical, educational and economic interest of the child.

(2) Law should be made to achieve the child's social, moral, ethical, economic and educational interest as well as provide the equality of status of the mother vis a vis the father. There is need to some change in the Act of 1956 and follow the recommendation of 133rd Law Commission Report which allows the mother to have the custody of minor till the age of Twelve years and the above Act should be amended on the same pattern

like Personal Law (Amendment) Bill 2010 which gave equal status to the mother in child custody cases.

(3) Judicial decisions should be based on welfare of minor child.

(4) The matrimonial court should continue to have jurisdiction on any matter regarding the child.

(5) The children should be treated as independent party and they should be represented separately.

(6) On adjudication of any matter relating to children, the matrimonial court should consider the wishes of the children, parents financial positions, suitability of the persons who claim the custody, age and sex of the child for deciding the welfare of the child.

(7) Access to children should be considered as complimentary to custody.

(8) The welfare principles projected in section 17 of the Guardian and Wards Acts 1890 needs to be spelt out for the simplicity of the judicial pronouncement. Regarding the protection of interest of the child the CRISP in India emphases on shared parenting because shared parenting can protect our cultural and family values and ultimately this would reduce divorce rates in the country.

(9) Give due consideration to the presence of a father in a child's upbringing not only as a name but also as the natural guardian and also give father a fair chance to win custody cases without any prejudice. Father is for life, not just for conception.

(10) The Court must weigh to the social economic production of child's interest.

(11) The Hon'ble Supreme Court need to emphasize on the need for a separate child welfare ministry separating it from the current clubbed scenario of women and child development ministry.

(12) Monitoring review and reforms of policies, programmes' and laws to ensure protection of the girl child;

(13) India should also be a signatory to the International Hague Convention for honoring foreign courts' judgment in India.

(14) Define parental abduction as a heinous crime and prescribe strict punishment for it by describing it as a cognizable, non- bail able and non-compoundable offence.

(15) Ensure that NRI (Non Residential Indians) rights under laws of custody. An access of the laws of NRI country is respected in India.

(16) Orientation programmers for judges of family course to be conducted by psychologist to sensitize them to child related issues.

(17) Special courts to be set up for child custody cases, so that spousal conflicts do not interfere in child matters.

(18) Child custody issues to be disposed of within six months of the date of application, or at least visitation be granted to the non custodian parents (fathers generally).

(19) Child interviews should be conducted for complex cases only after the child has been allowed to spend nearly equal and quality time with both the parents and such interviews be limited to adolescents only and then too the interview be viewed as a guiding evidence only and not a primary one.

(20) Children below the age of seven years should not be exposed to choice making between the parents as the process itself is cruelty to the child/children.

(21) If child access granted by courts are denied or subverted by the parent having the custody, strict actions must be taken and child access as granted should be ensured.

We hope the above recommendations will be best keeping in mind the interest of the child.

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Dedicated

to

My Mother

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Certificate

It gives me immense pleasure to certify that **Tabassum Jahan**, Research Scholar, Department of Law, Aligarh Muslim University, Aligarh has completed her Ph. D thesis entitled **"Custody of Children Under Different Legal Systems: A Comparative Study"** under my supervision. The material incorporated in the thesis has been collected from various sources; and she has used and analyzed aforesaid material systematically. The present work is an original contribution in the field of family law.

Prof. (Dr.) Saleem Akhtar
(Supervisor)

DECLARATION

It is hereby declared that the present thesis entitled **"CUSTODY OF CHILDREN UNDER DIFFERENT LEGAL SYSTEMS: A COMPARATIVE STUDY"** is an original work of under signed, no earlier work has been done on the same topic in this University and in any other University in India in my best of knowledge.

(Tabassum Jahan)

Date:

ACKNOWLEDGEMENT

At the outset, I bow before the Almighty Allah, the creator, the saviour of all creation, to whom I owe ail my success, achievements whatever little may be. It is indeed his blessings which -provided rue with enough zeal to complete my present venture.

Words far to express my profound sense of gratitude and obligations towards my supervisor ***Prof. Saleem Akhtar*** *(Present Dean) Department of Law, A.M.U., Aligarh for his skillful guidance, cognate attitude and incessant encouragement to compete this work, 'During the course of this study, despite of His busy schedule, he spared his valuable time whenever I needed his help. His thoughtful criticism, fruitful suggestion and very meticulous checking of all work have made this work more enjoyable and even more reader friendly.*

I am highly indebted to my erudite teacher ***Prof. Mohammad Sabbir*** *(Chairman) faculty of law, A.M.U., Aligarh for his vision, direction, valuable suggestion, scholarly guidance, help, inspiration and continuous encouragement right from the culmination of this work. He has always been a source of strength, inspiration and confidence for me.*

In the process of the completion of this thesis, I received valuable help from plural number of academic personalities and I would like to avail this opportunity to thank them nevertheless, the following names deserved special mention.

I wish to express my most sincere and profound gratitude to (Previous Dean and Chairman) ***Prof. Iqbal Ali Khan****, Faculty of Law, A.M.U., Aligarh for his cognate attitude and skillful guidance, continued encouragement in completing the thesis, despite his busy schedule and pre-occupation. It is, in fact surmountable for me to imagine how I could have trodden to envision and search, select and work and get fulfilled enviable treatise without help and hand, incentive and inspiration, encouragement and cooperation of my learned teachers.*

I am highly indebted to ***Dr. Qaisar Hayat*** *retired (Previous Dean and Chairman), Law Faculty A.M.U., Aligarh for their cooperation, constant support and suggestion through put my work.*

I will be failing in my duty if I do not express my sincere gratitude and indebtness to my teachers, ***Dr. Javed Talib, Dr. Mohd. Shakeel Samdhani, Dr. Zaheeruddin, Dr. Zafar Iqbal, Dr. Waseem, Dr. Zubair Ahmad Khan, Dr. Mohd. Ashraf, Dr. Zafar Mahfooz Nomani, Dr. Badar Ahmad, Mr. Iqbal Hadi Rizvi, Dr. Shakeel Ahmad, Mr. Hasmat Ali and Dr. Nafees Ahmad & Mr. Zakiuddin Khairuwala*** *for their constant support and prayers.*

I am highly indebted to ***Dr. Tanzeem Fatima*** *whose constant support, favour and guidance which was necessary for successive completion of this work.*

I am very thankful to God who has bestowed me with some of the finest people on this earth. My father ***Mohd. Noshey Miyan*** *and mother* ***Mrs. Roshni Begum,*** *who have been constant source of love, affection, motivation and strength. Their aspiring benefaction bestowed upon me so generously and their inspiring and precious advice helped in overcoming the hurdles throughout this work. They had been a beacon all along to enable me to present this work. I thank both of you for all your love, despite of all my flaws. I thank my brothers* ***Mohsin*** *and* ***Nabeel*** *and sisters,* ***Zeenat*** *&* ***Reshma*** *for their constant love, support and encouragement and supplying material and inevitable requirement for my case and dexterity. My words are very limited to describe their hidden hard labour, kind co-operation, unending love, constant support and prayers.*

I am thankful to God who has bequeathed me with the best husband, ***Khalid Ahmad Chaudhary*** *for standing by me in thick and thin. He has always been a constant source of love, motivation and strength and the young members of my family Aman, Kamran, Fatima Urooj, and who truly are the joy of my life.*

I am equally thankful to my friends Sheeba, Naghma, Uroosa, Shaista, Rehana, Tabassum Chaudhary, Shabista Aqueel (Civil Judge), Faizee for their co-operation, help, valuable suggestion and constructive criticism from time to time.

I would also like to extend my thankful to ***Imran Bhai,*** *Shop Competent Xerox Centre, complete this thesis with devotion, diligence and in an articulate manner.*

I am equally thankful to ***Mr. Sharif, Anwar Bhai, Mr. Roshan Khayal, Mr. Israr-un-Nabi, Rehnuma Baji, Azeem Bhai*** *and all the seminar staff for their assistance and help rendered to me.*

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ABBREVIATIONS

AC	Appeal Cases
AIIER	The All England Law Report
AIR	All Indian Reporters
ALJ	Allahabad Law Journal
ALL	Allahabad
BIC	Best Interest of Child
CAL	Calcutta
DMC	Divorce & Matrimonial Cases
ECHR	European Court of Human Rights
EWCA	England and Wales Court Of Appeal
FCR	Federal Court Reports (Australia)
FLR	France Law Review
GWA	Guardian and Wards Act
GAWA	Guardian and Wards Act
HC	High Court
HM	Hindu Marriage Act
HMG	Hindu Minority and Guardianship Act
HP	Himachal Pradesh
IFLR	International Financial Law Review
ILO	International Labour Organization
ILR	Indian Law Report
IWLR	International Weekly Law Reports
J & K	Jammu & Kashmir
KAR	Karnatka
MAD	Madras
MWCD	Ministry Of Women and Child Development

NOC	Note of Cases
NRI	Non Residential Indians
P&H	Punjab and Haryana
PAT	Patna
PCM	Prohibition of Child Marriage Act
PLR	Punjab Law Reporter
PUNJ	Punjab
RAJ	Rajasthan
RLR	Rajasthan Law Report
SC	Supreme Court
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
WLR	Weekly Law Report

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Introduction

INTRODUCTION

STATEMENT OF THE PROBLEM

Marriages in India are very sacred and considered to be once in a lifetime affair. The marriage occasion is an integral part of social traditions and rituals in which both sides' family members get involved very emotionally and their community members participate to give blessings for a happy married life. In recent times, increasing number of married couples is experiencing distress and incompatibilities. Due to various socio-economic factors, there is a rapid rise in discontent marriages in India as a result of which, the rate of divorces and separations have gone up. By this unpredictable social disaster, the family courts and other courts, police administration and various Counseling Cells are feeling helpless due to sudden rise in of matrimonial problems related cases such as custody of children. Today custody of children is debatable question in India as well as globally. In this study attempt has been made to critically analyze the existing laws under various religious and secular laws.

Child custody and guardianship are legal terms which are sometimes used to describe the legal and practical relationship between a parent and his or her child, such as the right of the parent to make decisions for the child, and the parent's duty to care for the child. The religion-based distinction of the personal laws is an evident and accepted fact. These laws are zealously guarded, fiercely protected and justified by the various religious communities. Both mothers and fathers have a prominent role to play in supporting the growth and development of their children. The basic opinion of the child and the mother is highly ignored while determining the custody of the child. As a father earns more than a mother, it does not entitle him to get the custody of the child in the event of a divorce. This situation is changing in recent cases where child custody is being awarded to the

parent keeping in view the best interests of the child.

In the social conditions that exist today it is necessary that parents must regard as their foremost responsibility to bring up their children as healthy, happy and useful individuals of an all round standard of education and as active builders of society. The purpose, therefore, of the law of the guardianship should be to ensure this development of the child and to safeguards its interest. This can be done only in the appointment of the guardian of a minor, the welfare of the minor is, made the first and paramount consideration and no other consideration, such as the superiority of the mother or father is taken into account. In divorce proceedings the matter of custody is the most complex and drenching issue which creates social, religious, economic, educational and legal problems in the society. Social problem in the sense child should be protected from human evil i.e. child cannot indulge in juvenile offences and social evil i.e. he or she may be grown up as a human beings in the society. It is the mother who primarily has given the company to her children in his/her tender age. Our religious laws have given superiority to the mother in comparison to the father in relation of the child. In all religious laws i.e. under Muslim law, Hindu law, Christian law, Parsi law child up to tender age remains under the custody of mother but after the expiry of that period the custody shifted to the father. Custody of child is an economic problem in the sense of awarding the custody of the child the court will see that who will give more financial support to the child because during these formative years the child needs more money for upbringing and for his/her education. Therefore court often gives custody to the mother but obligation to maintain his child remains with the father. Custody of children is a legal problem in the sense; court has given more concern towards the welfare of the child. Legal rights of the parties or parents are subordinate to the welfare of the child and therefore rule of father's supremacy is overruled by the welfare theory.

But before Independence there was no law which has given equal rights to the mother vis-à-vis father relating to the child's matters. The Guardians and Wards

Act 1890 also has given superiority to the father in matters of guardianship and custody. According to section 19 (b) of Guardian and Wards Act, 1890 "Nothing in this chapter i.e. appointment and declaration of guardian shall authorize the court to appoint or to declare a guardian of the property of a minor whose property is under the superintendence of a court of wards or to appoint or to declare a guardian of a minor, whose father is living and is not in the opinion of the court unfit". This provision retreated traditional concept of superiority of men over woman.

After Independence woman's organization have been demanding equal rights. The legislature and judiciary have also shown awareness towards there respective domain. Several legislative measures have been adopted to give equal right to the mother *vis-a-vis* father. But there are still areas where individual discrimination continues to exist. Similarly section 6 of Hindu Minority and Guardianship Act, 1956 also assigned a subservient position to the mother as natural guardian. Section 6 of Hindu Minority and Guardianship Act, 1956 states that the natural guardian of Hindu minor, in respect of the minor's person as well as in respect of minor's property in case of a boy or unmarried girl, the father and after him the mother, provided that the custody of a minor who has not completed the age of 5 years shall with the mother. Superior position of father also shows by this section. The question arises whether the preference to the father as against the mother notwithstanding the welfare principle is justified in the light of the provision of the constitution which states that not to discriminate against any citizen on grounds of religion, race, cast, sex, place of birth or any one of them? Is it correct to give preference to the father as against the mother keeping in mind the fact that it is the mother who suffers physical discomforts for nearly nine month even before the birth of the child? Should mother even so be considered less suitable in matters of custody mainly on account of her gender? The fact that a woman/mother continues to be treated unequal in terms *vis-à-vis* a man/father in regard to matter of custody it provides the necessary justification for considering the law of the subject and analyses whether our religious laws have been given justice to a woman/mothers in

relation to the custody of the children? However due to inadequate legal provisions the courts often tends to recourse to the phrase "welfare of the child " which has been differently interpreted by the courts in different situations.

The impact of globalization also affects the matrimonial relationship. It has increased the competition there by an extra pressure up on the parents/parties. Moreover the social system of the society has undergone a huge change where the nuclear family system has replaced the joint family system. This also further increased the burden on the parents, therefore no one to look after household affairs in their absence. Economic independence of the women/mother also creates a situation which often results in marriage breakdown. Ultimately this leads to the adverse affect on the development of the children. Children cannot live with both the parents. Therefore the problem of custody of child/children arises.

This research tends to find out the social, religious and legal position relating to child custody and how far law and judiciary worked for the benefit of the child

OBJECTIVE OF STUDY

The object of study is to examine the position of child custody under various religious laws in India. As well as mother's position in child custody a comparative approach is examining who is entitled to the custody after the mother or the father under Muslim Law, Hindu Law, Christian Law and Parsi Law. The object of study is to find out the historical background of the legislative development of custody in India and England. The study further emphasized upon development and welfare of child custody in India and England and to assess and evaluate the role of judiciary in case of custody of child. The study further examines to protect the social economic educational interest of the child in India. This study seeks to examine the various issues emerging in recent years at national and international levels like position of Non Resident Indians child custody.

REVIEW OF LITERATURE

Sir W. Mark by (1906) Introduction of Hindu and Mohammadan Law.[1] The author in his book has classified guardians of Muslim into three classes regarding the custody of children and explain that mother has right to custody of her children during the age of nurture.

Tayyab Ji (1920) Mohammadan law.[2] Regarding the custody of minor the author in his book give comprehensive list of those persons who are entitle to the custody of minor during infancy and custody of minor after infancy and also mentioned the rules of Shia law about the entitlement of the minor's custody right. He further explains about disqualification of guardianship. About the custody right of mother the author has explained that, the mother does not lose her right to the custody of her children by being divorced by the father of the children. But if the mother being divorced and marrying a second husband she loses her preferential rights to the custody of her children.

Russell Suharawady (1976), a hand book of Muslim Jurisprudence.[3] In this book a short paragraph relating to custody of children is given with Arabic Ayah. In this paragraph it is stated that when mother divorce by the husband the custody of child belongs to the mother till it attains puberty in the case of a girl or till her marriage.

Keith Hod Kinson (1984) Principles Of Mohammad an Law.[4] The author in his book has given emphasis on the following points .Rights of mother to custody of infant children, Right to female relations in default of mothers, female when disqualified for custody etc. Regarding the entitlement of the custody of children the author states that under Muslim Law the father is the Natural guardian of his children and right of custody of mother is subjected to the supervision of the father which he is entitled to exercise by virtue of his guardianship. If so, the right of Hizanat does not exist.

Ahmad Hasan (1985), Sauna Abu Dawad.[5] The author in his book has

quoted various Hadith relating to the custody of children (Hizanat), upbringing and also cited Hadith relating to the persons who are entitled to the custody of the child, either mother or the father, during their tender age. His study shows that the mother is the best person to have the custody of their children up to a certain age. After the expiry of that period, the custody should be transferred to the father.

Mohammad Ala - Uddin Haskafi (1992), the Darrul Mukhtar.[6] In his book the author has devoted a chapter on Tutelage (minor), in which he gives various conditions of custody and supported by many ulemas' views on the custody of a child. He quoted the ancient book of Kuneyatal Muniyah, he opined that a mother is best entitled to the custody of her minor children, although her manners be undesirable, and she be known to be wicked as long as the child does not attain discretion. After passing of the 7 years the child goes under the control of the father.

Charles Hemilton (1994), Second Edition in India Hedaya.[7] This book contains basic principle of Islamic law on every aspect of life and on every subject. It contains the detailed rules on Hizanat (Custody). The author highlights in case of separation of husband and wife the care of infant children belongs to the wife. The author also mentioned order of precedence in Hizanat. After the mother who is entitled to the custody of the minor child, and gives a long list of persons.

Mufti Fuzail-ur-Rehman Hilal Usmani (2000). The Islamic Law, Marriage, Divorce, Inheritance.[8] In this book the author analyzed various Hadith relating to the custody of a child. He has also discussed under what circumstances up to what age the mother has right to the custody of female and male child and when mother can lose her right of custody and after mother who is entitled to custody of children. The author further mentioned disqualification of the mother's rights of custody.

Trevelyan (1916), the Law Relating to Minors.[9] The author in his book

deals with law relating to minors in British India. In his book right of the mother's custody of the child is described as "on the death of the father, or in his absence, or in case of having the right of guardianship and in the absence of a valid appointment by him, the natural or adoptive mother as the case may be entitled to the guardianship of her minor children.

P. M. Bromley (1957), Family Law.[10] Common Law accorded no other right to the mother as such, and so absolute against her where the fathers right that he could lawfully claim from her the custody even of a child at the breast. But this fathers' right might be lost if to enforce them would lead to the physical or moral harm of the child. Thus apprehension of cruelty would deprive him of the right to custody. Furthermore the author also stated that the common law courts would not enforce the right to custody if the claim was not made bonfide for example: if the father's intention was to hand over the child to another or if he had some other lawful purpose in mind further the author discussed the statutory provisions relating to claims for custody, statutory power to deprived parents of custody, parents right to custody etc.

J. D. M. Derret (1963) Introduction to Modern Hindu Law.[11] The author in his book devoted separate chapter on Hindu Minority and Guardianship. He explains that Guardianship of minor is traditionally viewed as a right, and seldom as a right which can be profitable. The law however regards guardianship as a duty, which may be exercise only for the benefit of the minor. The author has said that a child of tender years was normally consigned to the custody of the mother. The mother could not act as natural guardian as long as the testamentary guardian appointed by the father was able to act.

T. P. Gopala Krishnan, P. V. Deolalkar, C. Unikanta Menon and R. B Sethi, 1964 Codified Hindu Law.[12] In this book the author discussed about the custody of children under Hindu Marriage Act 1955 and Hindu Minority and Guardian ship Act 1956 .The author has given the list of those persons who are

entitle to the custody of the child after the mother, the elder brother, elder half brother, half brother was preferred for guardian ship, both of the person and property of a minor, although their right might not be absolute as that of father or mother. After these the paternal relations generally were preferred and failing such relatives, the office devolves on the maternal kinsmen according to their degree of proximity. When the mother is dead the step mother is not entitle to be guardian, at any rate in preference to the paternal relations. In this book it is also mention that Nayer Hindus' governed by the provisions of both Travana core Act II of 110 and central Act XXXII of 1956, under section 10 (2) of the former Act, where the parents are divorced, the mother shall be the Guardian of both the person and property of the minor children.

S.C. Jain (1966) Law of marriage and divorce.[13] The author in his book says that as per the provision of the section 6 of Hindu Minority and Guardianship Act 1956, in case of minor son and unmarried daughter, father and after him the mother would be guardian provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. He further states that the father is the natural guardian of his minor children and entitled as such, to their custody and it is the duty of the court to make orders for appointment of a guardianship and custody of the minor consistently with the personal law of the minor, the prime and the paramount consideration is the welfare of minor, and the custody of a child in tender years should, therefore, remain with the mother, unless there are grave and weighty considerations which require that the mother should not be permitted to have the minor with her.

Sir Hari Singh Gaurs, (1973), Hindu Law of Marriage and Divorce.[14] In this book has explained sections relating to Special Marriage Act 1954, section38, regarding the custody of children, Indian Divorce Act 1869, section41, powers to make order as to custody of children in suit for separation.Section42, powers to make such orders after decree, section 43, and powers to make order as to custody of children in suits for dissolution of nullity. Section44, powers to make such order

after decree or confirmation. The author also explains that in dealing with an application of the child of tender age under section 26 of the Act in the case of a Hindu the court has to be guided by the considerations underlying the Hindu Minority and Guardianship Act 1956 and has cited some case law relating the custody of children.

Paras Diwan (1973), Law of parental control, guardianship and custody of minor children.[15] the author in his book mainly emphasizes all aspect regarding the guardianship and custody of minor children under Hindu Law, Muslim Law, Roman law, and English Law. And also give elaborate study regarding the principle of development and welfare theory in all the above mentioned Laws. Regarding the custody of minor child under Muslim Law, he says that mother's right of his Hizanat of her minor children is recognized by all the authorities of Muslim Law and it is universally accepted that it is the mother and mother alone who has the capability of bringing up of a child. Regarding the guardianship and custody of minor under Hindu Law, he says that ancient texts on guardianship are few. Guardianship of all children vested with king as parent's patria. Of necessity the guardianship was delegated by the king on the relation of the minor father's upper most claim over children was recognized. Mother's claim was recognized only after the father the author in his book has coated various ancient texts on guardianship in which it had established that father has first claim, after him comes the mother and then comes the elder brother. The author submitted that in none of the text including that of Narada, there is any mention of guardianship of the person of the minor. The text invariably lay down that the king is to protect the property of the minor. It seems that the text, as understood by Kulluka, refers to the guardianship of the property of the orphaned minor. In that society an orphan was required to go to his guru's ashram for education, and therefore the question of guardianship seldom arose. Naturally when a pupil goes to his teacher's ashram for study, he is under the care, control and protection of his guru. The teacher was thus guardian of his pupil 's person. Regarding the position under Hindu Minority

and Guardianship Act 1956 and Guardian and Wards Act 1890 father supremacy is established the mother has no right relating to the minor children the author in this book has discussed in detail the custody of minor wife and minor widow in which he stated that husband is the natural Guardian of his minor wife and mention that there are two types of trends of case Laws. (i) In some cases court have taken the view that husband being the natural Guardian of his minor wife, cannot be denied custody. (ii) while in some cases the court has subjected to the paramount consideration of the welfare of the minor wife it would be in the interest of the minor wife to lay down that the Guardianship of the person and the property is continued to vest in the parents and the husband will not be entitled to the custody of the minor wife so long as she is not physically fit for matrimonial intercourse. The author analyzed the development of the theory of best interest or welfare in India and in England where he had cited the case Law till the 1971.

K.D. Gangrade (1978) Social Legislation In India.[16] In his book the author states that Hindu Minority and Guardianship Act 1956 Act marks forward step in the modernization of Hindu Law by enlarging the rights of mother in case of custody of children by curving the powers of natural guardian in order to protect the interest of Minor and by Making welfare of the minor a paramount consideration.

Sir H.S. Gour (1978) Hindu Code.[17] In his Hindu Code bill book the author analyze that mother is not the natural guardian so long as the father is alive. During father's life time father, father is the guardian; mother is not the legal guardian of minor. The author of the book also analyze that the prime and paramount consideration is the welfare of the minor. The custody of a child of tender age should, remained with the mother unless there are grave and weighty considerations which require that the mother should not be permitted to have the minor with her. Minors who have not completed the age of five years are of tender age who can be best looked after by the mother. It has to be presumed that the welfare of the minor who has not completed the age of five years will be best

served if such a child is in the custody of its mother.

Jaspal Singh (1983) Hindu Law of marriage in India.[18] The author in his book discussed the Law relating to minor's custody, minors who have not completed the age of five years are of tender age who can be best looked after by the mother. The effect of section 6 is that in the absence of any special circumstances "indicating to the contrary, it has to be presumed that the welfare of the minor who has not completed the age of five years will be best served if such a child is in the custody of its mother. In his study the author further explain that the legislature has indicated its policy that the custody of minors who have not completed the age of five years should ordinarily be with the mother. It is only if special circumstances are established indicating that it is not in the best interest of a minor who has not completed the age of five years to be in the custody of the father that the court can consider if the welfare of such a child is best served by giving it to the custody of the father".

Priyanath Sen (1984) General Principles Of Hindu Jurispidence.[19] This book based on the Tagore Law Lectures the study of this book shows that there are twelve kinds of sons under Hindu Law. Under ancient Hindu Law Father has strong position over their children and his wife. The author stated about the position of women in these words "while women young she remains under the control of her father, after marriage under the control of her husband and, on his death under the control of her sons, she does not deserve complete independence at any time". The author also quoted verses in Sanskrit. Thus it is extracted from the above verse that the perpetual dependence of women doesn't mean to degradation of women. But it is only means that to protect the women. Because they are by nature week and unable to bear the turmoil's of the world and stand against its terrors and temptations without guidance and control.

Jill Black and Jane Bridge (1989), A Practical Approach to Family Law.[20]

The author highlights the four main Acts which are relevant in the development of concept of custody of children. Such as Guardianship of minors Act 1971, Guardianship Act 1973, Children Act 1975, and Child Care Act 1980. The author further emphasizes on the principles on which custody and access order are made etc.

Paras Diwan (1990). Law of Maintenance in India.[21] Regarding the custody of the children the author's views are that under Indian law guardianship still vests in the father. So long as he is alive he is the guardian of his minor children, mother has no right in respect of her children. Thus, when mother is entrusted with custody, she intact, is entrusted only with care and control. In this book the author has formulated the following considerations for passing an order for custody i.e. ;(A) Welfare of the child. (B) Wishes of the parents. (C) Wishes of the child. (D) Age and Sex of the child. In conclusion the author has said that 'In adjudicating any matter relating to children, the matrimonial court should consider the wishes of the children, wishes of their parents, financial position of the parents, suitability of the person who is claiming custody, age and sex of the child and all other matter which the court feel desirable to consider in deciding what is best in the welfare of the children. The author also conclude that access to children should be considered as complimentary, if one parent is giving custody of the child, the other parent should be granted adequate access to the child, so that it remains in the awareness of both the parents and is not denied the love and affection of both.

Atul M. Setalvad (2006) Conflict of Laws.[22] The author in his book talks about the conflict of laws relating to custody of child. According to his book under English law paramount consideration is welfare of the child and this rule applies in all cases, not only between parents, but between parents and strangers and between strangers. In his book the author also talks about the jurisdiction of court relating to foreign child custody matters.

Mulla (2007) Hindu Law.[23] In his book the author explains the principle of

child custody. He explains that under Hindu Law according to section 6 clause (a) rule of Hindu law father is the natural guardian of the person as well as the property of a minor son and a minor unmarried daughter; and next to him, the mother is the natural guardian of the person and the property of such minor. As regards the preference in matters of custody, there can be no general principle that mother has to be preferred to the father. The question of custody of a child would have to be determined on consideration of the attendant facts and surrounding circumstances including the age, sex and requirements of the child amongst other, the underlying principle always being the welfare of the child.

Kusum (2007) Family Law Lectures.[24] In her book the author explains the difference between guardianship and custody. Her study relied upon the recent case law relating to the minor's welfare and she elaborately defines the minor welfare she explain that the minor welfare has to be taken in its widest sense and must include the child's moral as well as physical well being and also have regard to the tides of affection.

Aqil Ahmad (2008) Muslim Law edited by Prof I.A Khan, Mohammadan law.[25] the author in his book makes difference between the schools of Muslim Law regarding the period of custody. He also mentions what is the position under shia school. He gave a long list of persons who are entitled to the custody of a minor child and tells about the right of the mother that she will remain custodian over her minor children till her remarriage. After marriage this right belongs to the father.

Paras Diwan (2009) Modern Hindu Law.[26] In his book the author emphasize about the custody of the person that a person having the care of the person of the minor or of his property or both person and property, "it may be emphasized that guardians exist essentially for the protection and care of the child and to look after its welfare. This is expressed by saying that welfare of the child is of paramount consideration. Welfare includes both physical and moral well being.

Mullah (2010), Hindu Law.[27] In this book the author has emphasized on section 6 of Hindu Minority and Guardianship Act. Clause (a) of the above Act declares that father is the natural guardian of the person as well as property of minor unmarried daughter, and next to him the mother is the natural guardian of the person and property of such minor. This clause rules defines that though the father is the natural guardian of the minors' person and property, the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. Unless there are some special facts and circumstances indicating that it is not in the interest and well being of the minor to be with the mother. The right provided in favors of the mother under this clause is as to the custody of the infant. It is not necessary that any such case the father should be removed from guardian ship. The author regarding the preference in matters of custody has explained that there can be no general principle that the mother has to be preferred to the father. The question of custody of the child would have to be determining on consideration of the facts and surrounding circumstances including the age, sex, and requirement of the child. The author in this edition has sighted recent case law on the child custody. The author further express about the mothers' position and stated that mother is lawful guardian of her illegitimate children.

Rao C Rama, (1989)[28], Trends in the International Child Custody Orders. In his article the author has given emphasis that the requirements of the domicile, nationality and ordinary residence are liberally construed if rigid adherence of rules would be harmful to the welfare of the child. The court should adopt a pragmatic approach in handing the child custody cases. He has also discussed Katrina of cases in his article.

Kusum, background papers on personal Laws, in which the learned author has critically analyzed the recent development in the area of child custody laws. (i) Legislation gender bias i.e.; the provisions of the Hindu Minority and Guardianship Act 1956 and Guardian and Ward Act 1890 are complementary and in determining the question of custody and guardianship, the paramount consideration is the

welfare of the minor. (ii) Law commission recommendations somehow, provides equal Guardianship rights for the mother have not been incorporated in the law. (iii) Judicial attitude of the court also made a significant contribution in the area of Guardianship. In *Geeta Hari Haran vs. Reserve Bank of India* the court observed that the wording of section6 (a) of the Hindu Minority and Guardianship Act and section19 (b) of the Guardian and Ward Act were challenged as being violative of article 14 and 15 of the constitution as being discriminatory since the mother is relegated to an inferior position. The court further observed that the section6 (a) of the Hindu Minority and Guardianship Act which says, "the father and after him the mother" do given an impression that the mother can act as guardian only after the life time of the father. However, instead of striking down this section as also section 19(b) of the guardian and ward Act as in constitutional, it chose to construe these provision in manner in which they would not offend the constitutional mandate of equality and non-discrimination. Adopting the rule of harmonious construction it held that the word "after" in section6 (a) of the Hindu Minority and Guardianship Act need not necessarily mean "after life time", but would mean, "in the absence of". If te father is not in the charge of actual affair of the minor either because of his indifference or by virtue of mutual understanding between the parents because of some physical or mental in capacity, or because he staying away from the place where the mother and the minor are living, then, in all such situations the father can be considered as "absent" under the provisions of both above mentioned Acts and the mother, who in any case is a recognized natural guardian, can act validly on behalf of the minor as the guardian. The predominant consideration in every case however would be welfare of the minor.

Malhotra and Malhotra Associate (2006)[29], Conflicts of jurisdictions in International Child Custody Disputes-the Indian experiences. This article also relates to the child custody of non residents Indians. The author in this article explains briefly about the problem of custody of child in NRI cases. They explain the definition of the term child removal by Hague Convention 1980 and give some

recent judgments of Indian courts and discussed the attitude of Indian judiciary about the Non Resident Indian Child custody matter. The author further explain that Indian judiciary only consider the foreign courts orders as only one of the factors in deciding interpretable child custody disputes and adjudicate up on the matter afresh on the principle of considering the best interest of the child as of paramount importance. But then, can the best interest of a foreign child born to foreign or Non Resident Indians parents would be decided the best on local parameters and as per local conditions by an Indian courts in an Indian jurisdiction.

Law commissions of India 83rd report, (1980)[30], On Guardian And Wards Act 1980 and certain provisions of Hindu Minority And Guardianship Act 1956.After examining the section 6 of Hindu minority and guardianship Act 1956.The law commission recommended that section 6 should be amended so that the age up 12 years to custody of child should ordinarily be with the mother. In this report law commission has also recommended that certain amendments should be made in section19 to ensure that the welfare of the minor becomes the paramount consideration in appointing a guardian (as to making welfare of the minor paramount under section25).

Law commissions of India 133rd report, (1989)[31], On "Removal of Discriminations against Women in matters relating to Guardianship and Custody of Minor Children and Elaboration of the Welfare principles". This report gives emphasis upon the provisions of the Hindu Minority and Guardian ship Act 1956 and Guardian and Wards Act 1890. This report high light that these above Acts still indicate the inequality of status of mother in relation to the child custody matters. Law commission in its 133rd report has recommended some suggestions for the protection of interest of the child and interest of its mother. It is also recommended that custody of minor child who has not completed 12 years of age shall ordinarily be with the mother.

Judicial attitude of our High courts and Apex court also shows that in matters of child custody courts often consider the welfare of the child is paramount. Keeping in mind the welfare of child some time court awards the custody to their parents and some time to the grandparents and third party. While determining the question as to which parent entitle to the custody of the child, the court consider the welfare of the child and not the right of the parents. Each case to be decided on its own facts and other decided cases can hardly serve as binding precedent in so far as the factual aspects of the case are concern. In most of the cases it is realize that father is better suited to look after the welfare of the child yet each case the court has to see primarily welfare of the child in determining the question of his or her custody. Recently Norway case also highlight that court award custody neither the mother nor the father but to the uncle who is resident in India keeping in mind the welfare of the child. Calcutta high court has given a custody to mother. But a day before Calcutta high court recalls Tuesday's order which put children under uncle's care. On 10 Jan 2013, Calcutta high court decided that children will spend another night with their mother, Sagarika chakarburty. The court is expected to pass an order on the basis of Child Welfare Committee, Burdan in November last year. The children were placed in the custody of their uncle in April last year. Justice Depankar passed an order that for one day children should stay with their mother. But next day justice Deepankar directed the children be returned to their uncle. Later the children were brought to the court. Justice Dutta heard the case in camera and spoke to Ms chakraborty and Dr bhattacharya. The matter was raised in the Calcutta high court by Ms chakaraborty who prayed before the court that the order of child welfare committee, Burdwan, be complied with the children handed over to her. The children were taken away from the Bhatta charaya`s resident. This was followed by the developments at the court. It criticize the police and directed that the children be returned to the to Dr Bhatta charaya. The Bhtta charaya children had come under the media glare when they were taken away by the Norwegian child

welfare service in May 2011. After an agreement was signed between the parents and Dr bhatta charaya, the children were handed over to him by a court in Norway. He was given the custody of children in April 2012, and they were brought back to India. On 11 Jan 2013 the Calcutta High Court in an interim order granted custody of the Bhattacharaya's children to their mother till the matter is finally disposed off. Justice Deepankar datta recalled its earlier order given by him where he directed, that children will stay with their uncle and said that mother's conduct of not returning the children was a "desperate attempt of a mother in distress''. Ms chakarborty later said the order ensured that the children "will now get the love and care of their mother they were deprived of so far''. This case upholds the Islamic Sharia i.e.; Ja'far said: she is my uncle's daughter. Her maternal aunt is my wife. *The Prophet (May Peace Be Upon Him) decided in favor of her maternal aunt, and said: the maternal aunt is like mother* In the light of the above case the judicial activism /reactions in matrimonial cases has against the socio-cultural and religious ethos of the country. In my opinion in our society the Norway case is not in the spirit of the family system prevailing in India.

ARTICLE PREVIEW WEBSITE

Alka Barua, Hemant Apte and Pradeep Kumar in their article Care and Support of Unmarried Adolescent Girls · in Rajasthan' available at <http://www.jstor.org> observed that adolescent girls have considerable unmet needs in health, reproductive health, and nutrition. A survey in Rajasthan sought to ascertain the extent to which unmarried adolescent girls receive care and support from their parents. Study findings suggest that a majority of them received a high or medium level of care. There was no clear pattern by socio-economic status. In a context where gender discrimination is rife, some families, regardless of their economic circumstances, do seem to provide nutrition, health, and psychosocial care for their adolescent daughters

Paresh Bihari Lal Student National Law Institute University, Bhopal in his

article entitled Child Marriage: An Incurable Disease? available at http:/www.airwebwolrd.com/articles/ index.php?articles= 1180#sdfootnotelsym extensively deals with the history of legislative frame work relating to prevention of child marriage and find out the fact that 57% of the girls in India marry before the age of 18 leaves no alternative but to accept that our attempts to weed out this deep rooted evil have failed miserably. Our tryst with the social evil of child marriage began in the year 1929, when Shri Harbilas Sarda drafted the Child Marriage Restraint Act, 1929, popularly known as the Sarda Act. The Sarda Act could not give the desired results hence this legislation was replaced by the Prohibition of Child Marriage Act in the year 2006, to check the largely unhindered practice of this ritual. This Act remains the law governing child marriages in India. Sadly it has not been able to keep its promise of dissuading this practice. In the wake of the above, the law commission of India has had to analyze the persistent problems and to give it some much needed consideration. In its 205th report the commission has extensively discussed the problem and has also put certain suggestions before the authorities. It remains to be seen as to how worthy they prove to be.

S. Faye Snyder was a part-time professor of developmental psychology at California State University, Northridge. She is a licensed marriage and family therapist and founder of The Institute for Professional Parenting (TIPP), a non-profit organization. She is a child custody evaluator and risk assessment evaluator. In her article entitled 'Best Interest of the Child, Part I. Overnights without Injury' available at <http://www.fayesnyder.com/?p=108> observed that here is a theoretical war in the field of psychology, just as there are adversarial positions in legal proceedings . There are different motives on each side, even amongst researchers. In the greater field of psychology, there is theory and research supporting the point of view of the parents, and there is theory and research supporting the needs of the child. In the courts, we need to remember the child's *best interests.* When we don't take these concerns into consideration, the child

grows to become an adult who is less fortified for life than he or she could have been. It is all about "how high is your bar" and how much we are willing to tear the child apart for the so-called needs of the parent(s).

HYPOTHESIS

Hypothesis means an idea or general opinion to be defended by a researcher and find out a new theory and new models put to test to determine its applicability, impact on the society and its legitimacy. The present researcher has formulated the following hypothesis.

- The conflict between the religious laws and secular laws in India to protect the socio-economic interest of the child in custody matters.
- The working of the legislation, Act and regulation are sufficient to provide the equal opportunity to the mother in cases of to protect the child `s interest. Is there any need of amendments in these Acts?
- Whether the approach of judiciary is traditional or pragmatic and formulated criteria to protect the interest of child since with the growth of globalization and technological development, sometime the court deviated from the religious law in the name of equity, justice and good consciousness. Whether there is need of uniform law on custody of child?
- Today the Non Residential Indians (NRI) child custody problem is a debatable area of matrimonial laws?

RESEARCH METHODOLOGY

The Present study will be descriptive and analytical study. The legal literature for the study will be collected from various sources. The present work depends heavily on the book reviews both of national and international, religious ancient texts both of Hindu laws and Muslims laws, government reports, law journals and periodicals articles, research papers, news papers, law commission reports in judicial decisions and various other primary and secondary sources. The

researcher has also used various internet website to collect the information rating to the subject of study. To make the finding of the study to reach at the meaning full conclusion and attempt will also be made to discuss, examine, analyze and critically evaluate different provisions of the enacted laws, conventions at national and international level. Secondary sources include books, law journal, magazines, newspapers, and newsletters etc. it is also pertinent to mention here that helps of various libraries particularly A.M.U law library, Indian law Institute(ILI), Delhi University Law library, A.M.U. Theology and Islamic studies library is taken.

The study is organize into seven chapters

Chapter-1: Custody of a child under different religious laws. This chapter deals with custody of children under four religious laws i.e. Muslim, Hindu, Christian and Parsi Laws.

Chapter-2: Dealt with custody of children: Legislative Development on Guardianship and Custody in India and England. This chapter talks about the Historical aspect of guardianship and custody laws in India and England. In this chapter the researcher has critically analyzed the genesis of the Act of 1956 on guardianship and custody of children. An analysis of Acts and Regulations which are responsible for the emergence of the concept of the custody of child laws in India and England.

Chapter-3: Custody of Minor Wife: Some Legal Issues. In this chapter the researcher highlights that the ill effect of child marriage on the society and legislative position relating to minor married girl and also discussed after passing the prohibition of child marriage Act 2006 who is entitled to the custody of minor married girl or wife. Either the husband or her parents and discussed the recent case on this issue. The researcher critically examines the recent Madras High Court Judgment in which the Madras High Court has given wider

interpretation of Section6 of Hindu Minority and Guardianship Act 1956 and cropped out number issues.

Chapter-4: Development of Doctrine of Best Interest Theory/Welfare Theory in England and India. This chapter has divided into two parts. Part I devoted to the statutory provisions and judicial decisions of English Court in which the court has given more emphasis on social, moral and economic rights of the child. In part II deals with the development of doctrine of Best interest theory in India in which the researcher lays emphasis also on Law Commission 83rd and 133rd report. Hindu Minority and Guardianship Act of 1956 and Guardian and Wards Act 1890. And also discuss case law on the child welfare theory.

Chapter-5: Protection of Economic and Educational rights of child: This chapter deals with the economic/educational protection of rights under Guardian and Wards Act 1890, Hindu Minority and Guardianship Act 1956, Prohibition of Child Marriage Act 2006 and protection under Non Resident Indian Laws.

Chapter-6: Non-Resident Indian (NRI) child's custody some issues: In this chapter the researcher has critically highlight the problems of Non Resident Indians (NRI) child custody. This problem has direct impact of the migration of Indians parents to develop countries. In this chapter the researcher has discussed the jurisdiction of the court, recognition of foreign judgments particularly relating to the NRI children. And judicial attitude of Indians Court regarding the custody of Non Resident Indians children.

The work ends with conclusion and has been concluded with some suggestions.

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Chapter-I

Custody of Children: Different Religious Laws

CHAPTER – I

CUSTODY OF CHILDREN: DIFFERENT RELIGIOUS LAWS

INTRODUCTION

In India there are four main religious laws i.e. Muslim law, Hindu law, Christian law, Parsi law. The researcher has chosen here to study the position of child custody under different religious laws.

(A) MUSLIM LAW

(a) Quranic Sanction:

First source of Islamic Law is Quran... It is the most Sacred scripture of Islam. It is the last and Final Revelation of Almighty God. This was revealed in the sixth century of the English Calendar to the last and Final Prophet Muhammad (PBUH):

The Holy Quran is a guide and blessing for all human being in every walk of life. As to custody of children there is no direct verse. But we can draw an inference from the under laying verse:

The mother's shall give suck
To their offspring
For two whole years[1]

(b) The Hadith:

The other scared scripture of Islam besides the Quran is the Sunnah. Sunnah means the model behaviour of the Prophet (PBUH). The narrations of "what the Prophet said, did, or tacitly allowed is called Hadith. These Hadith are supplementary to the Glorious Quran, while they did not over rule the teachings of the Quran nor do they contradict the Quran. About the custody of children, the well known Hadith is of Sunan Abu Dawud:

'Amr B. Shu'aib, on his father's authority, said that his grandfather 'Abd Allah B. 'Amr reported: A woman said: Apostle of Allah, my womb is a vessel to this son of mine, my breasts, a water-skin for him, and my lap a guard for him, yet his father has divorced me, and wants to take him away from me. *The Apostle of Allah (PBUH) said: You have more right to him as long as you do not marry.*[2]

This shows that the mother has more right to the custody of the child after divorce as long as she does not marry. The same views were accepted by Malik. Abu Hanifah and Al-Shafie. Abu Hanifah also maintains that if the woman is married to her relative she can retain the child in her custody after marriage. But Al-Shafai disagrees with him.[3]

"The custody of a male child is the right of the mother until the child is capable of taking care of his own self. This has been approximated at seven years of age, and the Fatwa (legal verdict) has been as issued on this age, as normally children are able to take care of themselves at this age."[4]

The above Hadith, regarding the custody of female child reflects that the mother has this right of custody until she reaches puberty. He has declared nine years of age. It is further observed that in cases of child custody most of the Hadith declares that mother is best entitled person to have the custody of a child until she remarries in case of divorce. The mother has right to take the male child in her custody until the male child is taking care of his own self and in case of a female child, the mother has right of custody until the female child reaches her puberty. The reason for this is that, in the early years, the mother and the other female relatives are more suitable for raising the young child (regardless of sex) with love, mercy, attention, and motherly care. The male child after reaching the age of understanding (7 years) is in need of education and acquiring masculine traits, which is why he is then transferred to the father it means the child up to the age of 7 years should be in the custody of the mother. The female child, after reaching the age of understanding is in need of being inculcated with female traits, which she receives by living with her mother. After reaching puberty, she is in need of protection which the father offers.[5]

In a Hadith recorded by Imam Abu Dawud in his Sunan, the Messenger of Allah (Allah bless him and have him peace) said to a woman who complained that her husband was intending to take her child away from her *"you are more rightful of the child as long as you don't marry."*[6]

The above Hadith is crystal clear that the mother has more right to the child as long as she doesn't marry. It means after marriage and during marriage in both cases mother is best entitled to the custody of a child. This is also supported by the Kuneyatul Muniyah the mother is best entitled to the custody of her child, although her manners be undesirable, and she be known to be wicked, as long as the child does not attain the discretion.

Hedaya also contain the Hadith relating to custody of children. According to Hedaya, custody of children in case of separation the care of infant children belongs to the wife. If a separation takes place between husband and wife who are possessed of an infant child, the right of Nursing and keeping it rests with the mother The Holy Prophet; saying "O Prophet of God! That is my son, the fruit of my womb, cherished in my bosom and suckled at my breast and his father desirous of taking him away from me into his own care to which the Prophet replied, *"you hast a right in the child prior to that of thy husband, so long as thou does not marry with a stranger."*[7] Moreover a mother is not only more tender, but also better qualified to cherish a child during infancy, so that commit the care to her is of advantage to the child, and sideck alluded to this, when addressed to Omar on a similar occasion explained. *"The spittle of the mother is better for the child than honey"*. O Omar! Which was said at a time when separation has taken place between Omar and his wife, the mother of Assim, the latter being then an infant at the breast, and Omar desirous of taking him from the mother, and these words were spoken in the presence of many of the companions, none of whom contradicted him but the maintenance of the child is incumbent upon the father. It is to be observed, however, that if the mother refuses to keep the child, there is no constraint upon her, as a variety of causes may operate to render her incapable of

the charge. Thus it is observed that Hamilton's Hidaya also support mother's custody right over her children.

The important Hadith relating to custody of children is of Hilal b. Usamah who quoted Abu Maimunah Salma, client of the people of Medina, as saying: While I was sitting with Abu Hurairah, A Persian woman came to him along with a son of hers. She had been divorced by her husband and they both claimed him. She said: Abu Hurairah, speaking to him in Persian, my husband wishes to take my son away. Abu Hurairah said: Cast lots for him, saying it to her in a foreign speech. Then her husband came and asked: Who is disputing with me about my son? Abu Hurairah said: O Allah, I do not say this, except that I heard a woman who came to the Apostle of Allah (may peace by upon him) while I was sitting with him, say: My husband wishes to take away my son, Apostle of Allah, and he draws water for me from the well of Abu Inabah, and he has benefited me. The Apostle of Allah (May peace is upon him) said: *Cast lots for him.* Her husband said: Who is disputing with me about my son? *The Prophet (PBUH) said: This is your father and this mother, so take whichever of them you wish by the hand. So he took his mother's hand and she went away with him.* Thus it appears from the above Hadith that if child is intelligent enough to make his choice. Then his or her right is to make wishes to go with either mother or father.

Al-Khattabi said in Al-Ma'dlim that this decision was taken about a boy who reached the age of maturity and did not need guardianship. There is a difference of opinion amongst scholars about such a boy. According to al-Shafi, if a boy is seven or eight years old, he will be given option to live with his mother or father. This is held by Ishaq. Ahmad maintains that he will be given a choice when he becomes mature. Abu Hanifah and Sufyan al-Thawri are of view that the mother has more right to the boy until he reaches the age when he eats and wears the clothes himself with out the help of others (i.e. about seven years); in the case of a girl, the mother can keep her in her custody till she menstruates. In the absence of the mother, the father has more right to the child. According to Malik, the mother has more right to the girls till they are married. The period of custody

does not end with their menstruation. As for boys, the father has more right to them till they come of age.[8] Thus according to the above Hadith if the boy make his choice his choice should be consider but Abu Hanifa and Sufiyan are of the view that mother had more right to custody of boy until he reaches the age of 7 years. Regarding the custody of girl mother had right to custody until the girl's puberty.[9]

The other Hadith relating entitlement of the custody of the child is of 'Ali where he said that Zaid b. Harithah went out to Mecca and brought the daughter of Hamzah with him. Then Ja'far said: I shall take her; I have more right to her; she is my uncle's daughter and her maternal aunt is my wife; the maternal aunt is like mother. 'Ali said: I am more entitled to take her. She is my uncle's daughter. The daughter of the Apostle of Allah (*May Peace Be upon Him*) is my wife, and she has more right to her. Zaid said: I have more right to her. I went out and journeyed her, and brought her with me. *The Prophet (May Peace Be Upon Him) came out. The narrator mentioned the rest of the tradition. He (i.e. the Prophet) said: As for the girl, I decide in favour of Ja'far. She will live with her maternal aunt. The maternal aunt is like mother.*[10] this tradition has been narrated by 'Abd al – Rahman b. Abi Laila through a different chain of narrators. This version has: He decided that she would be given to Ja'far and said: her maternal aunt is with him (i.e. his wife).

The other Hadith of Ali the custody of the children where 'Ali said that When we came out from Mecca, Hamzah's daughter pursued us crying: My uncle, my uncle. Ali lifted her and took her by the hand. (Addressing Fatimah he said :) Take your uncle's daughter. She then lifted her. The narrator then transmitted the rest of the tradition. Ja'far said: she is my uncle's daughter. Her maternal aunt is my wife. *The Prophet (May Peace Be Upon Him) decided in favour of her maternal aunt, and said: the maternal aunt is like mother.* This tradition has been narrated by 'Abd al-Rehman b. Abi Laila through a different chain of narrators. This version has: *he decided that she would be given to Ja'far and said that her maternal aunt is with him (i.e. his wife).*

(c) Ijma:

Ijma is also one of the important sources of Muslim Law. The consensus of opinion of the Muslim jurists, particularly companions of the Prophet is recognized, as the best guide of law. According to juristic opinion, women have more right to the custody of children than men; in principle custody belongs to them because they are more compassionate and kinder, and they know better how to treat small children, and they are more patient in dealing with the difficulties involved. The mother has more right to custody of her child first, whether it is a boy or a girl, so long as she does not remarry and so long as she fulfils the conditions of custody.

The conditions or qualifications of custodian are: being accountable (i.e. an adult of sound mind etc.), being free (as opposed to being a slave), being of good character, being a Muslim if the child is a Muslim, and being able to fulfill all obligations towards the child. The mother should not be married to a person who is a stranger (i.e. not related) to the child. If one of these conditions is not fulfilled and there is an impediment such as insanity or having remarried, the woman forfeits the right to custody, but if that impediment is removed, then the right to custody is restored. But it is best to pay attention to the interest of the child, because his/ her right comes first.[11] The period of custody lasts until the age of discretion and independence, i.e., until the child is able to discern what is independent in the sense that he can eat and drink by himself, and clean himself after using the toilet, etc. When the child reaches this age, the period of custody ends, whether the child is a boy or a girl that is usually at the age of seven or eight. With regard to the effect of travelling on transferring custody, if the parents have separated and are disputing custody, any of the following scenarios may apply to their travelling.

- If one of the parents wants to travel without moving, i.e., he or she intends to come back then the parents who is staying, has more right to the child.

- If one of them wants to travel for the purpose of settling there and the new city or, the route is dangerous, then the parent, who is staying has more right to the child.
- If one of them wants to move and settle within the same city, and the city and the route is safe, the father has right to the child than the mother, regardless of whether the one who is moving is the father or the mother.
- If both parents want to travel to the same place, then the mother should retain custody.
- If the place is nearby so that the father and child may see one another every day then mother should retain custody.[12]

When the child reaches the age of independence, the period of custody comes to the end and the period of kafaalah or sponsorship of the young begins, which lasts until the child reaches adolescence or in the case of a girls starts her periods. Then the period of custody ends and the child is free to make his own choices. Therefore it appears from the comments of the fuqaha that women have the right to custody of children in general, and that mother and grandmother particularly have this right. But the scholars differed as to who has more right to custody if the parents are in dispute and are both qualified to custody of the child. The Mallikis and Zahhiris think the mother has more right to custody of the child, whether it is a boy or a girl, the Hizanat think that boy should be given a choice, but the father has more right in the case of a girl. The Hanafis think that the father has more right in the case of a boy and the mother has more right in the case of a girl. Perhaps the correct view is that the child should be given a choice if the parents are disputing and they both fulfill the conditions for custody.

The other important percepts in Sunnah relating to the custody of child and upbringing as quoted by Mufti Fuzail-ur-Rehman that if the husband and wife separated and there is a child in the lap, the right to bring it up is the mother's. The fathers can not seize it but he will have to give all the expenses of the child. If the mother does not bring it up and entrusts it to the father, he will have to take it; he

cannot give it forcibly to the woman. If the mother is not there or if she is refused to take the child, then it is the maternal grandmother's right to bring it up. If the maternal grand mother be not there or she may refuse, then, third, it is the maternal great grand mother's right. Thereafter, the paternal grandmother and paternal great-grandmother are entitled for the custody of the child. If they also be not there, then it is the right of the child's real sisters, if the real sisters be not there, then of uterine sisters from the father's side; there after of maternal aunt and paternal aunt. If the mother, after estrangement from the child's father, married a man who is the child's mehram relative, e.g., a paternal uncle, even then the mother's right of bringing it up remains intact; the father cannot take the child. But if she married a man who is not a Mehram relative of the child, then her right of bringing up will be ended. But if she was separated from this man also due to divorce or his death, she will regain her right to bring up the child.[13]

If no woman is available from amongst the kins of the woman of the child for its nourishment, then it is the father's right, then of its grandfather and then great grandfather and then of its real brother. The right of bringing up a child is the same order as that of the right of guardianship. As long as a son is not seven years old, the mother has the right to bring it up. When he is seven years old, the father can take him. The right of bringing up a daughter continues till she is major. Then the father can take her; now the mother has no right to stop him. Child after the terms of Hizanat remains solely under the care of the father. A boy or a girl having passed the period of Hizanat, has no option to be with one parent in preference to the other, but necessarily remain in charge of the father. Shafai maintains that they have an option to remain with either parent. A mother can not remove with her child to a strange place: It is not allowed to one divorced absolutely after the expiry of her iddat, to go out with the child to one city to another where they are at a distance from one another, if the distance is such that it may be possible for the father to see his child, and return the same day, then the mother will not be prohibited from taking away the child, because it is like going from one Mohalla to another.[14]

(d) Mother's custody (Hizanat):

Under Muslim law the mother is best custodian of her minor male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child unless she remarries a second husband in which case the custody belong to the father. The term Hizanat means the right of rearing up a child. This right belongs to the real mother even she is Kitabiah, or Magian or is separated except when she becomes an apostate in which case she will not be entitled to Hizanat as long as she does not embrace Islam because during apostasy she will be kept in prison. According to the Kuneyatul Muniyah which is quoted in Darul Mukhtar states that a mother is the best entitled to the custody of her child, although her manners be undesirable and she be known to be wicked, as long as the child does not attain discretion.[15] Therefore, it is observed that the principle of Hizanat is based on considerations which are conclusive of the proper growth of the child. It cannot be disputed that child of that tender age would feel psychologically more secure in the company of the mother rather than of the father. The amount of love and care which a child receives from the mother cannot be had or expected from any other relation including the father under Muslim Law. As we have seen that Hazina who treats her child with cruelty or who is "unworthy of credit" is not entitled to custody of a child. Unworthy of credit means the woman who leaves her child without any care or neglects the care of a child. Her misconduct should amount to cruelty. Misconduct should be tested on the ground of the welfare of the child. Therefore, no misconduct is absolute. What amounts to misconduct will vary from case to case. Thus a woman who remains outside the home for a considerable time, either on account of work or otherwise and she leaves the child at home uncared is unworthy of credit.

After mother person entitled to the custody of the minor are:

(i) Mother's mother how high so ever,

(ii) Father's mother, how high so ever,

(iii) Full sister,

(iv) Uterine sister,

(v) Consanguine sister,

(vi) Full sister's daughter,

(vii) Uterine sister's daughter,

(viii) Consanguine sister's daughter,

(ix) Maternal aunt, in like order as sisters, and

(x) Paternal aunt also in like order as sisters.[16]

According to Hidaya and Fatwai Alamgiri, Tayab ji gives the following list of persons who are entitled to the custody of a minor child after the mother.

(i) Mother's mother

(ii) Father's mother,

(iii) Mother's grand mother how high so ever,

(iv) Father's grand mother how high so ever,

(v) Full sister,

(vi) Uterine sister,

(vii) Daughter of full sister how low so ever,

(viii) Daughter of uterine sister how low so ever,

(ix) Full maternal aunt, how high so ever,

(x) Uterine maternal aunt, how high so ever,

(xi) Full paternal aunt, hoe high so ever.[17]

According to Ameer Ali the person entitled to the custody of minor children are as under:

(i) mother's mother, how remote so ever,

(ii) the father's mother, how high so ever,

(iii) the grand father's mother how high so ever,

(iv) full sister,

(v) uterine sister,

(vi) full sister's daughter,

(vii) uterine sister's daughter,

(viii) consanguine sisters,

(ix) full consanguine

(x) uterine maternal aunt,

(xi) consanguine maternal aunt,

(xii) consanguine sister's daughter,

(xiii) brother's daughter,

(xiv) full paternal aunt,

(xv) uterine paternal aunt,

(xvi) consanguine paternal aunt,

(xvii) mother's maternal aunt of the full blood,

(xviii) mother's uterine maternal aunt,

(xix) mother's consanguine aunt,

(xx) father's maternal aunt of the full blood,

(xxi) father's uterine maternal aunt,

(xxii) father's consanguine aunt,

(xxiii) mother's paternal aunt of the full blood,

(xxiv) mother's uterine aunt,

(xxv) mother's consanguine aunt, and

(xxvi) father's father sister.[18]

(e) Islamic Schools:

There are four main Sunni schools of Muslim Law, they are(i) Hanafi (ii) Maliki (iii) Shafai and Hambali Shia schools are (i)Ithna Ashria (ii) Ismali (iii) Zhari schools.

(i) ***Hanafi School:*** According to the Hanafi Law the custody of the child is first vested in the mother as the person best fitted to ministering to the child's needs and to release the father for work. The Hanafi Law awards the mother custody until a son reaches seven years or a daughter's age of puberty, whereupon custody is transferred to the father.[19] The Hanafi Law lists a number of relations who, one after another, may replace the mother.

(i) Mother's mother how high so ever.

(ii) Father's mother, how high so ever.

(iii) Full sister,

(iv) Uterine sister,

(v) Consanguine sister,

(vi) Full sister's daughter,

(vii) Uterine sister's daughter,

(viii) Consanguine sister's daughter,

(ix) Maternal aunt, in like order as sisters, and

(x) Paternal aunt also in like order as sisters.[20]

A well known authority of Muslim Law Tayabji stated that after the mother i.e. when she is dead or unfit, the following females are entitled to Hizanat.

- Mother's mother.
- Father's mother.
- Mother's grandmother how high so ever.
- Father's grandmother how high so ever.

- Full sister.
- Uterine sister.
- Daughter if full sister how low so ever.
- Daughter of uterine sister how low so ever.
- Full maternal aunt, how high so ever.
- Uterine maternal aunt, how high so ever.
- Full paternal aunt, how high so ever.[21]

In the event of termination of custody with the mother or her legal substitutes, it goes to the child's father. If the father be dead or legally disabled, in the Hanafi Law his substitutes will be the paternal grandfather or great grandfather, a brother or his son and a paternal uncle – in this order. Next to them a paternal cousin of father's cousin may get the custody but of a male child only. In this list full blood has top priority, followed by half blood. Among the female as well as male the nearer always excludes the more remote.[22] Therefore, it is observed that Hanafi school followed by most of the Muslims in the world. According to this school also mother's right of custody is established. She is the best suited person to have the custody of a child.

(ii) ***Maliki School:*** Among the Malikis, after the mother the person entitled to the custody are as under:

- Maternal grandmother.
- The maternal great grandmother.
- The maternal aunt and grandaunt.
- The full sister.
- Uterine sister.
- The consanguine sister.
- The paternal aunt.[23]

According to this school the period of mother's custody of her infant child continues till the age of puberty in the case of a son and in case of a daughter till her marriage and her husband consummates the marriage.[24] There can be no valid objection to the adoption of Maliki principles (as in the dissolution of Muslim Marriages Act) where these are better suited to the needs of the society. It is suggested, therefore, that the termination of the period of custody should be left to the discretion of the courts, and that the best interests of the child should be the main consideration. The Maliki differ to some extent from the Hanafis respecting the order in which the right of custody is possessed by the various relations. For example, they hold that failing the mother of the child the right passes to the maternal grandmother, to the great grandmother, to the maternal aunt and grandaunt; to the full sister; to the uterine sister, to the consanguine sister; and to the paternal aunt. "When there are no relations of these degrees, or none qualified or willing to exercise the right of Hizanat, it passes to the father, and failing him to his executor, his son, his nephew, his uncle, and his cousin."[25]

(iii & iv) ***Shafai and Hambali School:*** If the husband divorces his wife who gives birth to a child, she has a right to the upbringing or custody, i.e. hadanah of the child[26] up to seven years; and after[27] those seven years, it is on the wish of the child that it will be given to such of the parents as it likes.[28] There are seven conditions for upbringing: Islam;[29] intelligence;[30] freedom;[31] piety[32] or 'iffah, residence[33], and being single[34] i.e. without any husband or wife living. If any one of the conditions disappears, the right to custody will be forfeited.

(v) ***Athna Ashari School:*** This school does not recognize any substituted for the mother for child custody; if the mother is dead or legally disabled it would give the custody to the father or the paternal grandfather. Failing the father's father the other relations are entitled with some doubts as the priorities.[35] According to Ameer Ali, after father's father the grandmother and other ascendants, the custody passes to collaterals within prohibited degree nearer excluding the remote relations.[36]

Thus it is observed that under Muslim Law the mother is accepted as best custodian of her minor children except under certain circumstances when she becomes cruel or unworthy of credit.

(B) HINDU LAW

(a) Hindu ancient text on the custody of the children

Manu[37] 'clearly ordains

> *"Custody of children vested of all children within the realm in the king as parens partic".*

Then the custody/guardianship was delegated on the relation of the minor as –

(i) Father `s uppermost claim

(ii) Mother only after father.

The ancient text of Hindu law did not speak about the natural guardianship but, on the basis of Narada's work who mentions father and other relation.[38] The idea of natural guardianship was developed through other sources. In the ancient society an orphan required to go to his guru's ashram for education. He was under the care, custody and protection of his guru. Therefore, the question of custody of minor child was not arising in that period. Study of Smirties like Manu Smirti, Yajanvalkya, Narada, Brihaspati; Katyana and Mimamsa, all these Smirties contain no rules relating to custody of the child. Except Narada Smirti which declares that father is absolute guardian of his minor property. Father can distribute his property among their sons as he pleases. According to Narada, the king was the guardian and the central position of the father in the joint family led consciously or unconsciously to the importation of rules of English Law. In the primitive society the father was the absolute power over his household matters. The father as the Karta of joint family enjoyed all the powers and protects the interest of the minor person as well as property. On the death of the father the elder male became the Karta. So the minor remain under the control and protection of the Karta. Mother has no status during the lifetime and after the death of her husband regarding the children matter. Mother was only guardian of her

illegitimate children. During the British period the law of guardianship/custody was developed through the Courts. It is recognized by the Court that the father is the natural guardian of his minor children, after his death the mother, no one else can be the natural guardian of minor children.

(b) Custody of Children:

(i) ***In case of dissolution of marriage,*** as regard the custody in case of dissolution of marriage, the custody of minor who has not completed the age of five years shall ordinarily be with mother 'read in conjunction with the provisions of section 9 of Guardian and Wards Act 1890, dealing with jurisdiction of the court where the wards' the place where the minor ordinarily resides; have been interpreted as meaning that, the place ordinarily residence qua jurisdiction, would be with the mother. Regarding preference in matters of custody there can be no general principle that the mother has to be preferred to the father. The question of custody of child would have to be determined on consideration of the attendant facts and surrounding circumstances including the age, sex and requirement of the child amongst others, the under laying, principles always being the welfare of the child.[39]

(ii) ***Legitimate children*** the custody of legitimate children under section19 of Guardian and Wards Act 1890 and section 6(a) of Hindu Minority and Guardianship Act 1956 speak about the position of the legitimate children. "Father is the natural guardian of his minor legitimate children, sons and daughters." Section 19 of the Guardians and Wards Act, 1890, lay down that a father cannot be deprived of the natural guardianship of his minor children unless he has been found unfit. The effect of this provision has been considerably whittled down by judicial decisions and by Section 13 of the Hindu Minority and Guardianship Act which lays down that welfare of the minor is of paramount consideration and father's right of guardianship is subordinate to the welfare of the child. Section 6 provides that the natural guardian minor, in respect of the minor person as well as in respect of the

minor's property is father and after him the mother is natural guardian of minor.

Section 6(a) in case of a boy or unmarried girl- the father, and after him, the mother; provided that the custody of a minor who has not the completed the age five years shall ordinarily be with the mother;

Section 6(b) in case of legitimate boy or an illegitimate unmarried girl- the mother, and after her, the father;

(iii) ***Illegitimate children***: the mother is the natural guardian of the minor illegitimate children even if the father is alive. However, she is the natural guardian of her minor legitimate children only if the father is dead or otherwise is incapable of acting as guardian. Therefore, the child born within living relationship is also come under this category. They only belong to the mother.

(iv) ***Adopted children:*** Section7 of Hindu Minority and Guardianship Act 1956 lays down that the natural guardian of an adopted son, who is a minor, passes on adoption to the adoptive father and after him the adoptive mother. The natural father and natural mother do not have any right after adoption. The term 'adoptive father' or 'adoptive mother' do not include step –adoptive mother and, therefore, they cannot be the natural guardian of step-adoptive son. Section 12 of the *Hindu Adoption of Maintenance Act* that with the effect from the date of adoption, the adoptive child shall be deemed to be the adoptive child of his or her adoptive father or mother, it should be held that adoptive father or adoptive mother shall be the natural guardian of the their adopted daughter also. A case may arise when a girl might have been adopted by women prior to her marriage, in such a case the husband home the adoptive mother marries can not be the father of adopted girl, and the only natural guardian for such a girl will be a mother. The same principle applies to case of an adoption of a boy made by women prior to her marriage.[40]

(v) Custody of minor married girl

According to Hindu Minority and Guardianship Act 1956 section 6(c) provides that the custody of minor married girl with the husband and in case of minor married widow girl the guardian by affinity is the guardian of a minor widow. Mayne said that "the husband's relation, if there exists any, within the degree of sapinda, are the guardians of a minor widow in preference to her father and his relations." The judicial Pronouncements have also been to the same effect.[41] the guardianship by affinity was taken to its logical end by the High Court in Paras Ram vs. State.[42] In this case the father-in-law of a minor widow forcibly took away the widow from her mother's house and married her for money to an unsuitable person against her wishes. The question before the court was whether the father-in-law was guilty of removing the girl forcibly. The Allahabad High Court held that he was not, since he was the lawful guardian of the widow.

A question has come before our courts; whether the nearest sapinda of the husband automatically becomes a guardian of the minor widow on the death of her husband or whether he is merely preferentially entitled to guardianship and therefore he cannot act as guardian unless he is appointed as such? Paras Ram seems to subscribe to the former view, and the Madras and the Nagpur high Courts to the latter view. Under Section 13, Hindu Minority and Guardianship Act, in the appointment of 'any person as guardian, the welfare of the child is paramount consideration. The fact that under Hindu law father-in-law has preferential right to be appointed as guardian is only a matter of secondary consideration. In our submission, it would be a better law if the guardianship of the minor wife, both of her person and property, continues to vest in the parents.

Thus Hindu law of guardianship was codified by the Guardian and Ward Acts 1890. Which lays down that the father is the natural guardian of hi minor legitimate children, sons and daughters. Section19 and 25 of the Guardian and Wards Act 1890 provides the custody of the children that a father can not be deprived of natural guardianship of his minor children unless he has been found

unfit. Under the Guardian and Wards Act of power the appointing, or declaring any person as guardian is conferred on the District Court. The District Court may appoint or declare any person as guardian of a minor child's` person as well as property whenever, it consider necessary for the welfare of the minor, taking into consideration the age, sex, wishes of the child as well as the wishes of the parents and the personal Law of the minor. Section6 (a) of Hindu Minority and Guardianship Act 1956 provides that custody of minor who has not completed the age of 5 years shall ordinarily be with the mother. The Act of 1956 also retains superiority of the father in matters of children.

Section 6 provides that the natural guardian minor, in respect of the minor person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are –

(a) in case of a boy or unmarried girl- the father, and after him, the mother; provided that the custody of a minor who has not the completed the age five years shall ordinarily be with the mother;

(b) in case of legitimate boy or an illegitimate unmarried girl- the mother, and after her, the father;

(c) in the case of married girl- the husband :

PROVIDED that no person shall be entitled to act as a natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)

Explanation in this section, the expression "father" and "mother" do not include the step-father and step-mother.

Further, Section13 of the Hindu Minority and Guardianship Act 1956 mention the welfare of the minor is paramount consideration and father's right of guardianship is sub-ordinate to the welfare of the child.

Similarly Indian judicial trend also highlights that (i) the children of tender year should be committed to the custody of the mother. (ii) Older boys should be in the custody of the father. (iii) Older girls in the custody of the mother. But this is not always true. The court may sometimes while considering the welfare of the minor award custody to the mother or the father or the third party. Judicial trend reflects that the court only see the welfare of the child is paramount consideration.

In *Andiappa vs Nallindrain*[43] in this case the Madras High Court observed that "mere fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the father of his right of custody of minor children. Unless and until he is found to be unfit."

In *Suppiah vs suppiah*[44] in this case the Madras High Court considered only welfare of the child is paramount consideration. Father can be deprived that even though he is not found unfit. If circumstances show that in the welfare of the child, the custody should be entrusted to someone else. The court award the custody to the mother.

In *Chemmapat vs Onkarappa*[45] the Madras High Court described the position relating to the custody/guardianship of minor children. The Madras High Court observed that "it is a common ground that the ancient texts of Hindu Law do not provide for the management of minor's property beyond stating that the guardianship shall vest in the king. The custom however, recognized that the father of the Hindu, and on his death, the minors mother is entitled to the guardianship of minor's state.

In *Mst Sakina vs Malka Ara Begum*[46] where mother filed a suit for custody of her two children. One aged four years and other one and a half year. The Allahabad High Court observed that "welfare of the children required that they should be in the custody of the mother."

In *Vesudevan vs Vishwa laxmi*[47] where the Kerala High Court grant the custody of minor below the five years of age to the father not the mother, on the ground that the father is natural guardian is entitled to the custody of the child.

In *Ratan Amol Singh vs Kamal Jeet Kaur*[48] in this case the mother filed the petition for the custody of three girls who were living with their father but the boy lived with the mother. The Punjab High Court observed that "the provisions of Guardian and Wards Act 1890 and Hindu Minority and Guardianship Act 1956 should be read together and thus, read the inevitable conclusion is the benefit of the minor's is dominant and paramount consideration. The court further observed that the father's right to the custody of the minor child is not absolute; nor is it indefeasible in law; it is circumscribed by the consideration of the benefit and welfare of the minor.

In the case *Chanandra Prabha vs Premnath*[49] in which Delhi High Court awarded the custody of a child below the five years to the mother. The Delhi High Court observed "the child under five years of age needs the most tender affection, caressing hand and the company of his natural mother and neither the father nor his female relations, however close, well-meaning and affectionate towards the minor, can appropriately serve as proper substitute for the minor's natural mother. This consistent with the role of nature and in normal circumstances, deserves to be noted and acted upon."

While *Rosy Jacob vs. Jacob*[50] where in Supreme High Court ruled over the Delhi High Court Judgment. The Supreme Court observed in this case that "the father's illness from the point of view of just mention can not over ride considerations of the welfare of the minor children. No doubt the father has been presumed by the statute to be better fitted to look after the children being normally the earning member and head of the family but, the Court in each case to see primarily to see the welfare of the children in determining the question of their custody in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for balanced and healthy growth of children. It is highly desirable that they get their due share of affection and care from both the parents in their normal parental home". But, the *Karalla High Court in Sebastian vs Thomas*[51] case observed that "the only paramount welfare of the child was in consideration of the child and it could not be

corrected to talk of the pre-eminent position of the parents or exclusive rights to the custody of the children when the future welfare of the children was being considered. The fact that the father was not to be unfit to be a guardian did not necessarily mean that he was entitled to the custody of the child."

Under the Hindu Minority and Guardianship Act of 1956 mother can act as a legal guardian and power of appointment conferred on both the parent. In *Geeta Hari Haran vs Reserve Bank of India.*[52] the Supreme Court has delivered a landmark judgment and rightly observed that under certain circumstances, even when the father is alive mother can act as natural guardian. The term 'after' used in section 6(a) has been interpreted as in absence of instead after the life time. Law Commission of India in its 83rd report on Guardianship and wards Act 1890 and 133rd Law Commission report on removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of welfare principles also stress to give same an equal right to the mother in respect of their child's` matter.

Recently in 2010 Parliament has amended the Guardian and Wards Act 1890 and modify section 19(b). According to this Amendment Bill now, section 19(b) of Guardian and Wards Act reads as "Section 19(b) include mother along with the father for the purpose of removing gender in equality. Section 19 Guardian and Ward Act "(b) of a minor, other that a married female whose father or mother is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor or" the purpose of the recent amendment is to remove the gender inequality. The law commission recommendations have been accepted through this amendment.

(C) CHRISTIAN LAW

(a) The Bible:

The Bible contains the following verses relating to the *"mother and child"*.

This is how the birth of Jesus the
Messiah comes about: His mother
Mary was pledged to be married
to Joseph, but before they came
together, she was found to be
pregnant through the Holy Spirit.[53]

When they had gone, an angel of
the Lord appeared to Joseph in a
dream. "Get up", he said, "take
the child and his mother and
escape to Egypt. Stay there until I
tell you, for Herod is going to
search for the child to kill him"[54]

So he got up, took the child and
His mother and went to the land
Of Israel.[55]

And said, "Get up, take the child
And his mother and go to the land
Of Israel, for those who were
Trying to take the child's life are dead."[56]

The above quoted Bible verses reflects that how the birth of Jesus came into existence and under which circumstances God give custody of the child to the mother and protect the life of child from the Herod.

(b) Custody of child under legislative laws:

(i) Custody under* Guardian and Wards *Act 1890:

Guardianship and custody of minors under Christian law with respect to person and property are generally governed by the provision of the Guardian and Wards Act 1890.

Under the Guardian and Wards Act 1890 an application shall be made for appointing a person as guardian to the district court having jurisdiction in the place where the minor ordinarily resides. However, with the establishment of family courts in India, the jurisdiction in matters connected with the appointment of guardian of the person of the minor now stands transferred to the family courts wherever such family courts are established. But with regard to the property of the minor, the district court above has jurisdiction. The application for appointment of a guardian is maintainable only in the court in whose jurisdiction the minor ordinarily resides and the expression "ordinarily resides" a place where the children are obliged to be well by force of circumstance or compulsion of parents' employment.

(ii) Custody under the Travancore Christian Guardianship Act:

The law of guardianship and custody among Christians of the East regulated through the Travancore Guardianship Act of 1941. This Act declares that the following persons, in the order named shall be the legal guardians of minors in respect of their person and properties, namely, the father, mother, paternal grandfather, full brothers in order of seniority half brother by thus same father, paternal uncle in the order of seniority and maternal uncle in the order of seniority, provided always that the husband shall be the legal guardian of his minor wife in respect of her person and property.

In fact the provisions of the Travancore Christian Guardianship Act 1941 specifically declares as to who shall be the legal guardian of a minor. When a statute declares a person to be the legal guardian of a minor child, no further decree from a court is necessary to establish the right of a person as guardian.

(iii) Indian Divorce Act:

Indian Divorce Act 1869 also contains provisions relating to custody of children. Section 41 of *Indian Divorce Act* 1869 relates custody in judicial separation while Section 42 of *Indian Divorce Act* relates to custody in annulled marriages.

Section 41 of the Indian Divorce Act (custody in judicial separation) read as: In any suit for obtaining a judicial separation the court may, from time to time, before making its decree, make such interim orders and may make such provisions in the decree, as it may deem proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, where it thinks fit, direct proceedings to be taken for placing such children under the protection of the said court.[57] The court, after a decree of judicial separation, may upon application by petition for this purpose make, from time to time, all such orders and provisions, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.[58]

Section 42 of Indian Divorce Act (Custody in Annulled Marriages) read as: In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in, or removed to, a high court, the court may from time to time, before making its decree absolute or its decree as the case maybe, make such interim orders, and may make such provision in the decree absolute or decree, and in any such suit instituted in a district court, the court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation, as the high court or district court as the case may be deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit, and may where it thinks fit, direct proceedings to be taken for placing such children under the protection of the court.[59]

(D) PARSI LAW

Under Parsi Law the issue of custody is also governed with by the Guardian and Wards Act 1890, under which it is a well established principle that the welfare of the child is paramount i.e. the most important thing considered by the guardian court when deciding custody of a child.

In any suit, under this Act the court may from time to time pass such interim orders and make such provisions in the final order as it may deem just and proper with respect to the custody, maintenance and education of the children, under the age of (18 years) the marriage of whose parents is subject to such suit and may after the final decree upon application by petition for this purpose, make, revoke, suspend or vary from time to time all order and provisions with respect to the custody, maintenance and education of such children as might have been made such final decree or by interim orders in case the suit for obtaining such decree were still pending.[60] It is settled law that any matter concerning a minor, has to be considered and decided from the point of view of the welfare of the minor. Section 49 imposes a duty on the court to make such order and provisions with respect to custody, maintenance and education of children as the court may deem fit and proper. It is obvious that the welfare of children is the paramount consideration in all matters regarding education maintenance and up bringing of minor children.

This section does not speak anything about a judge interviewing a minor before passing any order in the matter of custody, maintenance education of the minor and this section or any other section in this Act does not cast upon the court any duty or obligation to see the minor and ascertain the wishes of the minor. However, there cannot be any manner of doubt as to the Court's Power of interviewing any minor for ascertaining the wishes of the minor if the court considers it so necessary for its own satisfaction in dealing with the question relating to the custody.

As per there is no law which governs as the Parsis in India. As regard their illegitimate children liability to maintain in they are governed by the common law of England A Parsi, therefore, is under no legal obligation to pay maintenance to

his illegimate child.[61] Same position is found under Muslim law where father has no obligation towards his illegitimate children. The only duty of a father to maintain such children is merely a moral obligation or a duty of imperfect obligation. A civil suit for maintenance of such a child is not maintainable even on general principles of justice, equity and good conscience.

(E) DIFFERENCE BETWEEN MUSLIM AND HINDU LAW

The main difference between the religious laws is that under Muslim law; which is solely regulated by the Quran, Hadith, Muslim school, juristic opinion states that the custody of children up to a certain age belongs to mother but the father is a natural guardian of his children. While under Hindu law, ancient texts of Hindu Law do not give the superior power to the mother in matters of child's custody. This matter regulated by the Guardian and Wards Act 1890 and Hindu Minority and Guardianship Act 1956. These Acts retain the superiority of the father over the mother under Christian law; Parsi law fathers' position is also strong.

The second difference between religious laws is that Muslim law gave the list of persons who are entitled to have the custody of the children after the mother while Hindu law does not contain elaborate provision with regard to the various female relatives who are to have successively the right to the custody of a tender infant. This is because the natural condition of a Hindu family is what is known as the joint family.

CHART-I
(F) COMPARATIVE STUDY CHART

Marriage	Sunni school Hizanat				Property	Divorce/ separation
	Hanafi	Maliki	Shafai	Hambali		
1. Father [under the Muslim law of all schools, the father has the power to give his children of both sexes in marriage without their consent until they reach the age of puberty]. 2. Fathers father, how high so ever, 3. Full brother and other male relations on the fathers side in order of inheritance given under residuaries. 4. Mother. 5. Maternal relations with in prohibited degrees. 6. The Qazi or the court[1]	1. Mother (Male up to) The age of seven Years. 2. Father (male after seven years, and after Puberty). Default of Mother female. 3. Mother's mother. 4. Fathers mother 5. Mother's Grandmother. How so ever 6. Father's grandmother how high so ever. 7. Full sister. 8. Uterine sister. 9. Daughter of full Sister. How low so ever 10. Daughter of uterine sister, 11. Full maternal aunt, How high so ever	1. Mother (male up to the age of puberty, female till her Marriage). 2. Father (wisher of the child also Consider). Default of mother female 3. Maternal grandmother. 4. Great grandmothers. 5. Maternal aunt. 6. Grandaunt 7. Full sister. 8. Uterine sister 9. Consanguine sister. 10. Paternal aunt[1]	1. Mother (Male up to the age of seven years. Female up to seven years). 2. Father (Male after seven years, female after seven years). Default of mother female 3. Mother's mother. 4. Maternal uncle. 5. Father's father. 6. Paternal uncle	Hambali School follows the shafai School	1. Father. 2. Father's executor appointed by fathers will (they may be mother, brother, uncle). 3. Father's father. 4. The executor appointed by the will of father's father (they may be mother, brother, uncle etc[1].)	1. Mother 2. Maternal grandMother. 3. Maternal great grandmother. 4. Paternal grandmother. 5. Paternal great grandmother 6. Real sisters. 7. Utrine sisters (from father's side) 8. Maternal aunt. 9. Paternal aunt[1].
1. Aqil Ahmad Mohammadan taw 23rd Central law Agency AUahbad, 2008. p214	1. Tayabji Mohammadan Law, 3rd Samalochok office, Bombay, 1920, p. 275.	Paras Diwan, Law Of Parental Control Guardianship And Custody Of Minor Children Eastern Book Company, 1976, p.140			1. Mohan lal Dayalji Manek, Mohammadan Law 5th N.M. tirpathi Bambay 1956, p 79.	1. Mufti fuzail ur Rehman hi lal usmani, the is lamic law, Marriage, Divorce, Inheritance, Darussalam Islamic center Panjab Indian 2000, p. 111.

CHART-II

Comparative study chart

Marriage	Sunni school Hizanat				Property	Divorce/ separation
	Hanafi	Maliki	Shafai	Hambali		
	Male:- 1. Paternal grandfather 2. Great grandfather. 3. Brother, 4. His Son. 5. Paternal Uncle 6. Paternal cousin of father's Cousin may get the custody but of a make child only in this list full blood has top priority, followed by the half blood among the female as well as made the nearer always exclude the more remote	**Male:-** 1. Father 2. father's executor 3. The father's son 4. The father's nephew 5. The father uncle 6. The father cousin[1].				
	1. Mulla, Mohammadan Law. 15th N.M. Tripathi, private Ltd., Bombay, 1961, p.294	Paras Diwan, Law of parent control, guardianship and custody of minor children eastern Book company, Lal Bagh, Lucknow, 1973, p.140				

CHART-III

Comparative study

Hindu law Pre 1956 Act (position)	Christian law Pre 1956 Act (position)	Parsi law Pre 1956 Act (position)
1. Father 2. Mother 3. Brother 4. Paternal relations 5. Maternal relation[1]	1. Father 2. Mother 3. Paternal Grandfather 4. Full brother's 5. Half brother's 6. Paternal uncle 7. Maternal uncle[1]	1. Father 2. Mother[1]
Post 1956 Act (position)	Post 1956 Act (position)	Post 1956 Act (position)
1. Father 2. Mother (custody normally given to the mother up to the age of five years, yet if she neglects the custody will be given to the father) 3. Father's mother 4. Mother's mother 5. Uncle[2]	1. Father 2. Mother 3. According to the interest of the child court awards the custody to his or her parents or it may be third person.[2]	1. Father 2. Mother 3. According to the interest of the child.[2]
[1] Strange, treaties on Hindu law fifth ed. p 72. [2] Section 6 of Hindu Minority and Guardianship 1956.	[1]The Travancore Christians Guardianship Act 1941. [2] Guardian and Wards Act 1890.	[1]Guardian Wards Act 1890 [2] Hindu Minority and Guardianship Act 1956.

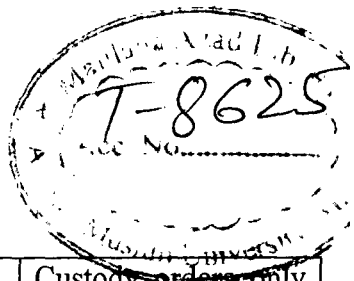

CHART-IV

Custody and Guardianship

Matrimonial statues		Hindu Marriage Act, Parsi Marriage and Divorce Act, and Indian Divorce Act, all provides for custody of children in suits under the Acts.	Custody orders only when matrimonial suits pending.
Hindu Minority and guardianship Act, 1956	Section 6	Natural Guardian of minor Hindu boy, or unmarried girl is father and after him the mother. If child below 5, custody normally with mother.	Provision is discriminatory. Apex Court judgments have enlarge situations where mother may act as Guardian but, has not conferred equal rights.
Guardian And Wards Act, 1890		A secular Law for appointment and declaration of Guardian.	Act is applicable to all.
	Section 19	If father alive no other person can be appointed as Guardian unless the father found to be unfits.	Clear gender bias.

CONCLUSION

After studying Quranic position, Hadith, Islamic schools, juristic opinion it is observed that only the Muslim law which gave superior rights to the mother in matters of custody of the child. No other religion gave this right to the mother. Under Hindu law we have seen that old texts gave emphasis on father's superiority over his children. The concept of custody in Hindu law and other religions come through legislation. The Indian legislature has made laws relating to custody of Hindu Minor Children which is primarily contained in Guardian and Wards Act of 1890 under Section 19 and 25. Section 19 invoked "when the petitioner before the court seeks orders regarding the appointment and declaration of a person as guardian" and Section 25 invoked "when the petitioner before the court, desires to obtain the court orders as to the custody of a minor" As is well known the concepts of *"guardianship"* is much wider than that of *"custody"* also, an aspect which incidentally is recognized in the Hindu Minority and Guardianship Act in Section 4(b) when it provides, *interalia*, that the word *"guardian"* means a person having the care of the person of a minor or his property. Besides this, Sections 6 and 13 of Hindu Minority and Guardianship Act also contained the law relating to custody of a minor child, and petition of Habeas corpus under Article 226 or Article 32 of the Indian constitution may also involve questions as to custody of minor children. Legislation also retains supremacy of father in all matters. However, recent legislation relating to personal laws (Amendment) Bill 2010 has changed this position. Now the mother and father have equal right in their children's matters. The position under Christian and Parsis Laws is also the same as under Hindu Law. These laws are also regulated by the Guardian and Wards Act 1890. According to the modern welfare theory all religious laws are subordinates to the child's interests. It is also submitted that our religious laws up to some extent give importance to the child's social, moral, ethical, economic and educational problem or interest of the child. The above are important matters of consideration in case of custody of a child.

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3. Ibid.
4. See Radd Al-Mukhtar, Vol. 3, p. 566.
5. Mufti Fuzail-ur Rehaman Hilal usmani, The Isamic Law, Marriage and Divorce, Darrusalam Islamic Centre, Punjab India, 2000, p.111.
6. Supra n. 2, p.616.
7. Hemilton's Hedaya, Commentary on Islamic Law, Vol. II, Kitab Bhavan, New Delhi 1963, p.138.
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9. Ibid.
10. *This shows that the maternal aunt is like mother is respect of custody of a child.* It is already agreed unanimously that mother has more right to take the child in her custody vis-a-vis other heirs.
11. http://www.islam-qa.com/en/ref/8189 (visited at 1/2/2002).
12. Ibid.
13. Supra n. 5, p.111.
14. Mohammad Alauddin Haskafi, The Darrul Mukhtar Kitab Bhavan, New Delhi, 1992, p.303.
15. Ibid.
16. Mulla Mohammadan Law (15th Ed), p.292.
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21. Tayabji, Mohammadan Law (3rd ed.) Samalochak Office, Bombay, 1920, p. 275.
22. Mulla Mohammadan Law 15th ed. NM Tirpathi Private Ltd, Bombay, p.294.
23. Paras Diwan, Law of Parental Control, Guardianship and Custody of Minor children, Eastern Book Company, Lucknow, 1976, p.140.

24. Supra n.14, p310.

25. Aqil, Mohammadan Law, Academic Books Publishers, p.227.

26. That is, the mother of child regarding responsibilities relating to food, drink, bathing, washing clothes, treatment in sickness, by taking care, etc., and the expenditure will be on him or her who is liable to maintain the child, and if the mother refuses to bear the responsibility, the mother's mother will be the next custodian.

27. This limit of seven years is fixed keeping in view that it is possible that, by this time, the child becomes able to take care intelligence, otherwise, till the child becomes able to take care of itself.

28. That if there is fear of injuries, as by reason of lunacy, the right to custody will be given to another until that injury remains, and if the father is not present, the father's father will be entitled to the right, otherwise. To maternal uncle and then to paternal uncle.

29. An infidel has no right to custody.

30. The lunatic has right to custody irrespective of the period of his lucidity.

31. The slave has no such right.

32. A woman dissolute has no right and justice or adalat which outwardly determines the piety.

33. That is, both the parents are in a town, and if any one of them decides to go, the child will be kept with the one who resides, and if the journey is for Allah, then, the father has the right.

34. It means that there should be no stranger's relationship. Thus, if the person in prohibited degree of relationship, for example, child's uncle, or uncle's son, etc., marries, the right to custody will not be cancelled.

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55. Mathew 2:21.

56. Mathew 2:20.

57. Section 41 of the Divorce Act 1869.

58. Section 42 of the Divorce Act 1869.

59. Section 43 of the Divorce Act 1869.

60. Section 49 of Parsi Marriage and Divorce Act, 1936.

61. Criminal Procedure Code, Section 125.

Chapter-II

Custody of Children: Legislative Development in India and England

CHAPTER - II

CUSTODY OF CHILDREN: LEGISLATIVE DEVOLOPMENT IN INDIA AND ENGLAND

INTRODUCTION

Child custody and guardianship are legal terms which are sometimes used to describe the legal and practical relationship between a parent and his or her child, such as the right of the parent to make decisions for the child, and the parent's duty to care for the child.[1] No ancient civilization considered child protection to be a governmental function. In ancient Rome, for instance, fathers were vested with an almost unlimited natural right to determine the welfare of their children. The welfare of minors was a family matter, not a governmental interest or obligation. Most other governments of the ancient world provided no limits to a father's right to inflict corporal punishment, including infanticide.

Child custody law remains the most contentious areas of family law. In divorce proceedings, the most complex and emotionally drenching issue is that of child custody. Children, infant have to bear the pain for no fault of theirs. Due to the extreme emotional attachment, both parents want to keep the custody of the children. In Indian set-up, such question is decided by the court of Guardian and Wards.

(A) GENESIS OF GUARDIAN AND WARDS ACT, 1980 AND HINDU MINORITY AND GUARDIANSHIP ACT, 1956: IN INDIA

At the time of enactment of Guardian and Wards Act 1890 women has not right to interfere into the matters of child custody there was only social and legal insecurity and false superiority of man. The Act of 1890 lays an emphasis on the preferential claims of the father. This Act incorporates the following provisions relating to the custody of minor child i.e.; Section 17, Section19, Section 25. Section17 of the Guardian and Wards Act 1890 provides that (1) in appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this

section, be guided by what, consistently with the Law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. (2) In considering what will be for the welfare of the minor the court shall have regard to the age, sex, not religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any of a deceased parents, and any existing or previous relations of the proposed guardian with the minor or his property.

Section 17 clause (3) of Guardian and Ward Act 1890 provides that if the minor is old enough to form an intelligent preference, the court may consider that preference.

Section17 clause (4) omitted by Act 3 of 1951, sec 3 and

Section 17 clause (5) of the Act contemplates that the court shall not appoint or declare any person to be a guardian against his will.

While section 19 of the Guardian and Ward Act 1890 provides nothing in this chapter shall authorize the court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person—

(a) Of a minor who is married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person; or

(b) [***] of a minor whose father is living and is not in the opinion of Court, unfit to be guardian of the person of a minor; or

(c) Of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

Section 25 lays down—(1) if a ward leaves or is removed from the custody of a guardian of a person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested to be delivered into the custody of the guardian. (2) For the purpose of arresting

the ward, the court may exercise the power conferred on a Magistrate of the first class by section 100 of the code of criminal procedure, 1882 (10 of 1882).[2]

The Act of 1890 was not the comprehensive; therefore, there were many factors responsible for emergence of Hindu Minority and guardianship Act of 1956. (i) The Shastric Hindu law was not uniform. (ii) There were differences between different schools of Hindu law all rooted in ancient divergent customs and traditions the Government of India, therefore decided to codify the Hindu Law. Thus the Act of 1956 codified. The purpose of the Act was to amend and codify certain parts of the law relating to minority and guardianship among Hindus. It can into force on 25 August 1956. It extends to the whole of India except the state of Jammu and Kashmir. It applies to every person domiciled in India and wherever residing who is not a Muslim, Christian, Parsi, Jew by religion.[3] In fact this section covers even those non Hindus who do not profess any of the four above mentioned faiths. The law thus does not leave any one in a state of religiouslessness. This enactment replaces the traditional Hindu law of guardianship hitter to applicable to Hindu by virtue of any text, rule or interpretation, or any custom or usages having the force of law. Thus both the provisions of the Dharam Sastras and the judicial precedents are nullified for the sake of uniformity and progressive out look.[4] where therefore, the Act of 1956 is silent, the Act of 1890 operates.

The other important fact which lead to the Act of 1956 marks progress is the status of women in all spheres and changed concepts as to child welfare that Act has given women the right of guardianship (after the father) and also provided that the mother should ordinarily have the custody of the minor child till the age of five is more important which has made the welfare of the minor the paramount consideration in the appointment of guardian, though it has kept intact the concept of "minor's welfare" as adumbrated in Section 17 of the Act of 1890, without spelling it out for its own purposes.[5] The social conditions at the time of enactment of Hindu Minority and Guardianships Act 1956 were altogether different from those were prevailed in 1890. The goal of Act of 1950 is to achieve social justice envisages conditions conducive to freeing family relations from distortions and

deformations associated with the exploitation of man and with the social and legal degradation of women and their material in security. Women have now a status of equality with men in all spheres of life. The social significance of the family is now being recognized. It should develop into unit supporting and promoting those talents and human qualities which foster the development of the individual. Parent must regard it as therefore most responsibility to bring up their children as healthy, happy and useful individuals and of an all-round standard of education, so as to enable them to blossom as active builders of society and the guardian must ensure this development of the child and safeguard its interest. In appointing a guardian for a child the court must determine which of the claimants is, by his or her educationist competence and influence and his or her own example best suited to provide the requisite care in bringing up to child. There fore all above mention reason responsible for the genesis of the Act of 1956.

Welfare of the children is the paramount consideration before the Court while deciding the question as to who is entitled to have the custody of children the Act of Hindu Minority and Guardianship 1956 incorporates the following provisions regarding the custody of minor child i.e. Section 6 and section 13. Section 6 provides that the natural guardian of minor, in respect of the minor person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are –

(a) in case of a boy or unmarried girl- the father, and after him, the mother; provided that the custody of a minor who has not completed the age five years shall ordinarily be with the mother;

(b) in case of legitimate boy or an illegitimate unmarried girl- the mother, and after her, the father;

(c) in the case of married girl- the husband :

PROVIDED that no person shall be entitled to act as a natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)

Explanation in this section, the expression "father" and "mother" do not include the step-father and step-mother.

Section 6 of the Act of 1956 contemplates that in a case of a boy it is father and after him the mother who is natural guardian provided the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. While Section 13, of the 1956 Act lays down that welfare of the minor is of paramount importance:

- While appointing or declaring a guardian for a minor, the court shall take into account the welfare of the minor;
- No person shall have the right to guardianship by virtue of the provisions of this Act or any law relating to the guardianship in marriage if the court believes that it is not in the interest of the minor.

The word welfare has the widest amplification. It is to be understood so as to cover the material and physical well being, education, health, happiness and moral welfare of the child.[6] What constitutes the welfare of the minor has to be determined by the court after a careful consideration of the facts and circumstances of the case, as the Act does not lay down any test or guidelines to determine what is for the welfare of the minor. The court has taken into account all relevant facts on record and to decide whether father or mother should be appointed as guardian of the minor. While arriving at this conclusion, the welfare of the minor alone will be supreme consideration. It is not necessary for the court to appoint father alone as a guardian in preference to mother under Section 6. That Section is further controlled by Section 13(2) which gives ample power and jurisdiction to the court not to appoint a person as a guardian, if it is the opinion of the court that such appointment was not in the interest of the minor. The welfare of the minor child is of paramount consideration in the appointment of a guardian. Guardian and Wards Act, 1890 does not provide what the custody of child of any age should be with the

mother, only unlike section 6(a) of the Hindu Minority Act 1956 which provides that the custody of child below five years of age should be with the mother only. Similarly, the Personal Law Amendment Bill, 2010 amend section 19(b) of Guardian and Ward Act on the basis of the recommendation of the Law commission of India 83rd report include the mother along with the father as a fit person to be appointed as guardian so that courts shall not appoint any other person as guardian if either of the parent is fit to be the guardian of such minor. Under clause (b) section 19 of the guardian and ward Act, 1890, mother was not included along with the father. This amendment bill amended Section 19(b) to include the mother along with the father.

(B) GENISIS OF ENGLISH COMMON LAW:

The historical background of child custody law sheds light on the coercive nature of parenting plan and child custody and visitation orders in the modern family law context. The law of child custody is a survivor of the equity system of jurisprudence, which first arose in the Chancellor's court in England and developed over the centuries alongside the courts of law in England and the United States.

In addition to the case-by-case determinations by the chancery court regarding children's property and guardianships, Parliament, in 1601, promulgated the Poor Law Act, which, among other provisions, provided the government jurisdiction to separate children from pauper parents and to place poor children in apprenticeships until the age of majority (21 for males and 16 for females). In 1660 Parliament passed the *Tenures Abolition Act*, which presaged the end of feudalism, including guardianships in chivalry that had formed the basis for the earlier Court of Wards and Court of Chancery over the guardianship of both children's and the Crown's inheritance and property interests. ("Guardianships in chivalry" provided that when a tenant on a lord's land died leaving an heir under the age of majority, the lord could control the minor heir's inheritance until the child became an adult.) The Tenures Abolition Act was revolutionary because it

vested in the father the right to appoint a guardian for his child heir, which was previously forbidden under the feudal inheritance laws.

From 1660 until 1873 the Court of Chancery administered equity jurisdiction in conflicts between private parties over testamentary guardianships. It was during these equity determinations that the Court of Chancery expanded the substantive scope of child protection to include, in addition to inheritance and property, concerns over a ward's rights to marry, to a particular type of education or school, to the choice of religious training, and to child custody arrangements. In 1839 Parliament dramatically expanded the court's jurisdiction to determine the best interest of children through the *Custody of Infants Act*, which provided court jurisdiction to over-ride a father's parental rights, including rights to custody and visitation. Most historians would agree that by the nineteenth century governmental concern in the child's best interest were perfected directly through the doctrine of *parent's patriae,* rather than indirectly through legal contests over property and guardianships.

(a) History of Legislation on Guardianship and Custody in England:

After the judicature Acts the courts still vigorously enforced the rights of the parents, especially of the father to control the religious education of a child.[7] However, since the middle of the 19th century, Parliament has intervened in a series of statutes, the effect of which has been to whittle down the father's rights further and also to give the mother positive rights to custody.[8] The process of reform initial in 1839 was gathering momentum.[9]

(i) Custody of Infants Act, 1873:

This Act extended the principle *Talford's Act* of 1839, by empowering the court to give the mother custody until the child reached the age of 16.[10] It did not. however repeat the provision relating to her adultery, Section 2, which is still in force, introduced a further reform, which had long been over due, by enacting that agreements as to custody or control in separation deeds (which had formerly been

void as contrary to public policy) should be enforceable so long as they were for the child's benefit.

(ii) Guardianship of Infants Act, 1886:

This further extended the provision of the earlier Acts by empowering the court to give the mother custody until of her children till they reached the age of 21. Furthermore, the father was now stopped from defeating the mother's rights after his death by appointing a testamentary guardian, for it was enacted that the mother was to act jointly with guardian so appointed, and for the first time she herself was given limited powers to appoint testamentary guardian.

(iii) Custody of Children Act, 1891:

It provides that if a parent has abandoned or deserted his or her child, the burden shall shift to prove that he is fit to have custody of the child claimed and that the court may refuse to give him possession of the child altogether (Section 1). Moreover, if at the time of parent's application for custody the child is being brought up by another person, the court may now, upon awarding custody to the parent, order him to pay the whole or part of the costs incurred in bringing it up.[11]

(iv) Guardianship of Infants Act 1925:

It may be noted that the Act of 1925 gave statutory effect of the rule that in any dispute relating to a child the court must regard its welfare as the first and paramount consideration. It also completed the process of assimilation of the parent's rights by enacting that neither the father nor the mother should from any other point of view be regarded as having a claim superior to the other and by giving to the mother the same right to appoint testamentary guardians as the father.[12]

(v) The Children Act of 1953:

The position in 1953 was as follows:

"Subject to this fundamental principle (welfare of the child) an infant's father still remains his sole legal guardian during his (the father's) life time, but this fact, of

course, adds little, if any thing, to the father's primary position as a parent. On the father's deed, the infant's mother becomes, either sole guardian or guardian jointly with a guardian appointed by the deed or will of the father, or, in default, by the court. And even during the father's life time, the mother has the same right to apply to the court in respect of any matter affecting the infant as the father has, and an equal right to appoint by deed or will a guardian to act after her death as co-guardian with her surviving husband, or if he is dead, the Guardian appointed by him. In the event of differences of opinion between the surviving parent and the guardian appointed by the deceased parent, the court may award sole custody of the infant to either, as it may consider best for the welfare of the infant".[13]

(vi) Custody under English Act of 1971:

The principles on which questions relating to custody, upbringing etc of minors are to be decided is thus laid down in the *English Act* of 1971.

Where in any proceedings before any court (Whether or not a court as defined in section 15 of this Act):

- The custody or up bringing of a minor;
- The administration of any property belonging to or held on trust for a minor, or the application of the income there of is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take in to consideration whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, in respect of such custody, up bringing, administration or application is superior to that of the mother or the claim of the mother is superior to that of the father".[14]

(vii) The Children Act of 1973:

It provides the equality of parental rights in these terms:

"1 (i) in relation to the custody on up bringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor

or the application of in come of any such property, a mother shall have the same rights and authority as the law allows a father and the rights and authority of mother and father shall be equal and be exercisable be either without the other."

Then there is the inherent jurisdiction of the High Court in regard to ward ship. Finally, the law relating to Habeas corpus, in so far as it deals with the recovery of minors below the age of discretion is also relevant side by side with this legislative developments as to guardianship and custody, legislative measures for the welfare of the children have come in quick succession with the passage of latest Act on the subject *Children Act* 1975. This branch of the law has become a fairly complex one in England. The object of legislation relating to children is to provide for the care, protection, maintenance welfare, training, education and rehabilitation of neglected and delinquent children and for the trial of the later. Accordingly, the children acts initially made elaborate provisions for the establishment of specialized machinery for dealing with such legislation.

However, the range and coverage of the legislation has now expanded. The *Children's Act*, 1975 introduces certain provisions. One new concept "Custodianship" the Act provides a means whereby (as an alternative to adoption), relatives and others looking after children along term basis can apply for, and obtain the legal "custody" of the children. A "Custodianship" order under the Act vests "legal custody" of the child in the applicant, who becomes known as the child's "custodian". A "custodian" appears to be in a similar position to a parent having custody of his child, but is not called his "Guardian". "Custodianship" may be said to be a new form of guardianship, though giving less rights and powers than guardianship, and to be similar to, but not identical with custody.

CONCLUSION

The history of legislative development relating to custody of children in India reflects that till the 1890, position of father was dominant in all matters mother had no right to involve in Childs matter but after passing the Hindu

Minority and Guardianship Act 1956, The position of mother has changed Section 6(a) provides that Natural guardian of Hindu minor in respect of minor person as well as in respect of minor's property the father and after him the mother. This Act retains the superiority of the father. Inspite of this *83rd Law Commission Report on* Guardian and Wards Act 1890 has made various recommendations to remove gender discrimination in this respect, and had also laid down guidelines for the courts. It recommended equal right's of guardianship and custody of the mother and gave some suggestions regarding the custody of children in persuasion of the above, recommendation in 2010 the Personal Law (amendment) Bill has been passed with some modification of Guardian and Wards Act 1890 according to which section 19 (b) include mother along with the father for the purpose of removing gender inequality similarly 133rd law commission report upon "Removal of Discrimination Against Women in Matters Relating To Guardianship and Custody of Minor Children and Elaboration of the Welfare Principle." According to this mother should have same and equal rights in respects of the custody of minor persons as well as property?

Similarly, the history of England law relating to custody of a child shows two important trends. The first is the gradual equalization of the parental status of the mother and father of a child born in wed lock. In the second development, the parental rights of both mother and father have become less important as the welfare of the minor has reason to be the first and paramount in any litigated issue relating to the custody and upbringing and administration of the property of the child. It is thus concluded from the above discussion that legislative norms are made for the protection of child interest and gave to some extent equal rights to mother legislative norms are not bound to follow the religious norms. Therefore all religious norms are subordinate to the legislative norms. The legislative norms in India and in England try to follow or adopt to give importance to the child's social, moral, ethical, economic, educational problem.

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Chapter-III

Custody of Minor Wife: Some Legal Issues

CHAPTER -III

CUSTODY OF MINOR WIFE: SOME LEGAL ISSUES

INTRODUCTION

In this chapter researcher will try to find out the Law relating to custody of minor married girl. In this connection the researcher tried to explain the ill-effects of minor marriages, legislative attitude towards the minor marriages will judicial attitude regarding the custody of minor wife. Recently the Madras High Court has given a landmark judgment on the custody of minor wife. So, the researcher analyzes the position of child custody in minor marriages.

Early marriage affects millions of children throughout the world. Early marriage, better known as minor or child marriage is defined as marriage carried below the age of 18 years, "before the girl is physically, physiologically and psychologically ready to shoulder the responsibilities of marriage and child bearing."[1] Many factors interact to place a child at risk of marriage. Parents encourage the marriage of their daughters while they are still children in hopes that the marriage will benefit them both financially and socially, while also relieving financial burdens on the family. Strong correlations between a woman's age at marriage and the level of education she achieves, the age at which she gives birth to her first child and the age of her husband has been well documented. Early marriage means also the individual becomes sexually active early, raising children while children themselves. The marriage of a young girl affects not only her life but that of the children she will bear.

Early marriage is by no means a new phenomenon.[2] It is a socially established practice that has been carried on from generation to generation. This is despite the existence of international and regional instruments that the India has ratified. The government also settled upon 18 as the minimum legal age at marriage. However, they are often either unable to enforce existing laws, or

rectify discrepancies between national laws and customary and religious laws. Most often, child marriage is considered as a family matter and governed by religion and culture, which ensure its continuity. It remains therefore a widely ignored violation of the rights of girls and women and exposes them to multiple risks, including to sexual abuse and exploitation.

(A) ILL EFFECTS OF MINOR MARRIAGES

In relation to problem of Child marriage particularly in India, it is best suited to say that once upon a time in India a demon called child marriage was born.[3] Centuries later it still exists and is mildly hindered and largely active. The fact that 57% of the girls in India marry before the age of 18[4] leaves no alternative but to accept that our attempts to weed out this deep rooted evil have failed miserably. Our tryst with the social evil of child marriage began in the year 1929, when Shri Harbilas Sarda drafted the *Child Marriage Restraint Act*, 1929, popularly known as the *Sarda Act*. The *Sarda Act* could not give the desired results hence this legislation was replaced by the Prohibition of Child Marriage Act in the year 2006, to check the largely unhindered practice of this ritual. This Act remains the law governing child marriages in India. Sadly it has not been able to keep its promise of dissuading this practice. In the wake of the above, the law commission of India has had to analyze the persistent problems and to give it some much needed consideration. In its 205th Report the Commission has extensively discussed the problem and has also put certain suggestions before the authorities. It remains to be seen as to how worthy they prove to be. What is lucid is that child marriage cannot simply be wished away from the society, something concrete must be done. Today this form of marriage is largely condemned as it unequivocally damns a child to a fate worse than death. Such an opinion is not without cause. It goes without saying that marriage, psychologically, is a harrowing task. Burdening a child with the arduous nuances of a family is nothing short of cruelty. Child marriage poses umpteen health hazards to the young couple that ranges from minor ailments weaknesses to the risk of death. It is to be noted that children do not have

mature genitals. Thus frequent intercourse renders the young couple susceptible to a higher risk of sexually transmitted diseases.[5]

One of the primary issues is that of child pregnancies. Child brides become pregnant at an early stage. They undergo pregnancy and consequently child birth at a young age. Most of the girls either have not attained sexual and physical maturity and they are, hence, not adapted to the perils that pregnancy poses to the 'to be' mother and such a pregnancy may even prove fatal. Young mothers under age 15 are five times more likely to die than women in their twenties due to complications including hemorrhage, sepsis, preeclampsia/eclampsia and obstructed labour.[6] Maternal mortality amongst adolescent girls is estimated to be two to five times higher than adult women.[7] Maternal mortality amongst girls aged 15-19 years is about three times higher.[8]

If a young girl does manage to deliver a baby, then his survival becomes a matter of concern. The infant's chances of surviving are indeed bleak. The babies of child brides have been found to be sicker and weaker and many do not survive childhood. A young mother may not be able to provide the necessary nutrition to the child. Infants of mothers aged younger than 18 years have a 60 per cent greater chance of dying in the first year of life than those of mothers aged 19 years or older Babies are born premature or underweight or young mothers simply lack parenting skills and decision-making powers.[9] Moreover child mothers and their babies are found to be victims of malnutrition. Countries with a higher level of child marriages have a higher level of maternal and child mortality and higher levels of maternal and child malnutrition.[10]

Not only does child marriage endanger the health of children it also stifles them socially. An early marriage is often a predecessor to the termination of education for the child brides, as they are heaved with daily chores. Married girls are seldom found in school, limiting their economic and social opportunities. 71.6% of Indian women currently aged 20-24 years, who had been married before the age of eighteen years, did not have any education at all.[11] This is truly a catastrophe as education, apart from providing them with a better future, better

prepares them for pregnancies and helps them to take better care of their young ones. Educated women are more likely to have a say in decision-making regarding the size of their families and the spacing of their children. They are also likely to be more informed and knowledgeable about contraception and the health care needs of their children. The misery of these children do not end here, statistically child brides have a higher risk of becoming a victim of domestic violence, sexual abuse and even murder. It is hence plain as to why this ritual is being tagged as nothing short of an absolute torture for the young lives.

The purpose and rationale behind the Prohibition of Child Marriage Act, 2006 is that there should not be a marriage of a child at a tender age as he/she is neither psychologically nor physically fit to get married. There could be various psychological and other implications of such marriage, particularly if the child happens to be a girl. In actuality, child marriage is a violation of human Rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little education and poor vocational training reinforcing the gendered nature of poverty. Young married girls are a unique, though often invisible, group. Required to perform heavy amounts of domestic work, under pressure to demonstrate fertility, and responsible for raising children while still children themselves, married girls and child mothers face constrained decision making and reduced life choices. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity. Where a girl lives with a man and takes on the role of caregiver for him, the assumption is often that she has become an adult woman, even if she has not yet reached the age of 18. Some of the ill-effects of child marriage can be summarized as under

(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.

(ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.

(iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.

(iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.

(v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality. Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a young age a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula can also be caused by the early sexual relations associated with child marriage, which take place sometimes even before menarche. Child marriage also has considerable implications for the social development of child bridges, in terms of low levels of education, poor health and lack of agency and personal autonomy. The Forum on Marriage and the Rights of Women and Girls explains that „where these elements are linked with gender inequities and biases for the majority of young girl, their socialization which grooms them to be mothers and submissive wives, limits their development to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control. Women who marry early are more likely to suffer abuse and violence, with inevitable psychological as well as physical consequences. Studies indicate that women who marry at young ages are more likely to believe that it is sometimes acceptable for a husband to beat his wife, and are therefore more likely to experience domestic violence themselves. Violent behavior can take the form of physical harm, physical harm, and

psychological attacks, threatening behavior and forced sexual acts including rape. Abuse is sometimes perpetrated by the husband's family as well as the husband himself, and girls that enter families as a bride often become domestic slaves for the in-laws. Early marriage has also been linked to wife abandonment and increased levels of divorce or separation and child brides also face the risk of being widowed by their husbands who are often considerably older. In these instances, the wife is likely to suffer additional discrimination as in many cultures divorced, abandoned or widowed women suffer a loss of status, and may be ostracized by society and denied property rights. Although the law appears to be well equipped, it is far from perfect. In the year 2006 Hindustan Times reported that 57% of the girls in India are married off before they are 18 years of age. The national family health survey 2005-2006 carried out in 29 states across India confirmed that 45% of the women currently aged 20-24 years were married before 18 years of age. This was higher in the rural areas at 58.5 % than in the urban areas at 27.9% and exceeded 50% in 8 states. These marriages also result in pregnancies which are hazardous for the health of the expectant mothers. The 2001 census of India reported that over 300000 girls less than 15 years of age had given birth to at least one child.[12] although child marriages are prevalent all over India; certain areas such as Rajasthan are particularly notorious. A 1993 survey carried out in the state says that out of 50,000 women studied in Rajasthan, 56% had already entered into a wedlock before the age of 15 years and 17% of them were married before they could attain the age of 10.[13] In a recent survey by 'Save the girl' UNICEF as many as 82 % of the girls in Rajasthan get married before the age of 18. Another shocking fact surfaced in NFHS-3, the survey showed that more than 50% of the girls in the state become mothers by the age of 19 years. Rajasthan is an infamous topper in the area of child marriages, with the average age of marriage for the girls being 16.6 years, Bihar at 17.2 years and Madhya Pradesh at 17 years follow closely. Certain days such as the occasion of 'Akha teej' are witness to mass practice of this ritual. These occasions are considered auspicious for marriage.

The above facts showcase a brazen continuity of this ritual which is only possible because the law affords it. There is widespread defiance of the law because the law itself is inefficient to prevent the same. Indeed the laws in its existing state can hardly prove to be deterrence to this social evil. For preventing of these ill effects of minor marriages parliament has been passed the PCM Act.

Here, the question arises that in case of minor marriages the custody of these minor females married children belongs to whom?

(B) LEGISLATIVE POSITION

In India there are some Acts relating to the minor marriages but, there is no proper guiding provision relating to the minor married girl. Let us make comparative study of the child marriages Act i: e Child Marriage Restraint Act 1929 and Hindu Marriage Act 1955, Hindu Minority and Guardianship Act 1956, Guardian and wards Act 1890, Prohibition of Child Marriage Act 2006, a child marriage was recognized as a valid marriage in Hindu Law despite the implementation of the Child marriage Restraint Act, 1929. The Hindu Marriage Act, 1955 came into being with effect from 18.05.1955. Section 4 of the said Act states that save as otherwise expressly provided in this Act, any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act. But, no inconsistency could be noticed between the provisions of the Hindu Marriage Act, 1955 and that of the Child Marriage Restraint Act, 1929. Both the Acts coexist. Section 5 (iii) of Hindu Marriage Act 1955 provided that the bridegroom has completed the age of [twenty-one years] and the bride the age of [eighteen years] at the time of the marriage; The effect of violation of the conditions enumerated in Section 5 of the Hindu Marriage Act are dealt with in Sections 11 and 12 of the Act. Section 12 of the Hindu Marriage Act speaks of a voidable marriage which reads as follows:-

(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

(a) That the marriage has not been consummated owing to the impotence of the respondent; or

(b) That the marriage is in contravention of the condition specified in clause (ii) of Section 5; or

(c) That the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)] the consent of such guardian was obtained by force [or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent]; or (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage:

(a) On the ground specified in clause (c) of sub-section (1), shall be entertained if

(i) The petition presented more than one year after the force had ceased to operate or, as the case may be, the Fraud had been discovered; or

(ii) The petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) On the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied:

(i) That the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) That proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year

of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) That marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of [the said ground]. A close reading of these two provisions would go to show that a marriage solemnized in violation of sub section (iii) of Section 5 of the Hindu Marriage Act has not been declared either as void or voidable. The marriage which falls within the ambit of Section 11 has been held to be void from its very inception [vide *Yamunabai Anantrao Adhav vs Anantrao Shivram Adhav*[14], so far as avoidable marriage as provided in Section 12 of the Act is concerned, the said marriage may be annulled by a decree of nullity on any one or more of the grounds enumerated there under. Since the Hindu Marriage Act 1955 as well as the Child Marriage Restraint Act 1929 do not declare a marriage of a minor either as void or voidable, such a child marriage was treated all along as valid the insertion of option of puberty to Hindu Law in Section 13(2) (iv) of the Hindu Marriage Act inserted by *The Marriage Laws (Amendment Act),* 1976, indicates the silent acceptance of child marriages. The option of puberty provides a special ground for divorce for a girl who gets married before attaining fifteen years of age and who repudiates the marriage between 15- 18 years. Even after the consummation of marriage but not in Islamic law.

It was felt that the Child Marriage Restraint Act did not achieve the desired result. Despite the punishment provided for child marriages, and despite making the punishment more stringent, the menace of child marriage could not be completely eradicated. There were demands from various quarters for making an effective law for this purpose. The Law Commission also recommended for such a

law. The Prohibition of Child Marriage Act, 2006 was brought into force thereby repealing The Child Marriage Restraint Act, 1929.

As envisaged in Section 1 of the said Act, it extends to the whole of India except the State of Jammu and Kashmir; and it applies also to all citizens of India; provided that nothing contained in this Act shall apply to the Reno cants of the Union territory of Pondicherry. It is manifestly clear that this Act is secular in nature which has crossed all barriers of personal laws. Thus, irrespective of the personal laws, under this Act, child marriages are prohibited. The term child has been defined in Section 2 (a) of the said Act 2006 which states that Child means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. This provision is in pair material with sub section (iii) of section 5 of the Hindu Marriage Act. One of the important and salient features of the Prohibition of Child Marriage Act, 2006 is that Section 3 of the Act which declares that every child marriage, whether solemnized before or after the commencement of the said Act shall be voidable at the option of the contracting party who was a child at the time of the marriage; provided that petition for annulling the child marriage by a decree of nullity may be filed in the District Court only by the contracting party to the marriage who was a child at the time of the marriage. Section 3 of the Prohibition of Child Marriage Act reads as follows. Child marriages to be voidable at the option of contracting party being a child: - (1) Every child marriage, whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.

The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money.

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed. This is a great departure made by this Act from the Hindu Marriage Act. When the Prohibition of the Child Marriage Act, 2006 was enacted, the parliament was aware of the provisions of Sections 5, 11, 12 and 18 of the Hindu Marriage Act. By declaring that the Prohibition of Child Marriage Act shall apply to all citizens, the parliament has intended to allow the Prohibition of Child Marriage Act to override the provisions of the Hindu Marriage Act to the extent of inconsistencies between these two enactments. This is manifest from the statement of Objects and Reasons of the Prohibition of Child Marriage Act, 2006 which read as follows: - The Child Marriage Restraint Act, 1929 was enacted with a view to restraining solemnization of child marriages. The Act was subsequently amended in 1949 and 1978 in order, inter alia, to raise the age limit of the male and female persons for the purpose of marriage. The Act, though restrains solemnization of child marriages yet it does not declare them to be void or invalid. The solemnization of child marriages is punishable under the Act. There has been a growing demand for making the provisions of Act more effective and the punishment there under more stringent so as to eradicate or effectively prevent the evil practice of solemnization of child marriages in the country. This will enhance the health of children and the status of women. The National Commission for women in its Annual Report for the year 1995-96 recommended that the Government should appoint Child Marriage Prevention Officers immediately. It further recommends that (i) the punishment provided under the Act should be made more stringent; (ii) marriages performed in

contravention of the Act should be made void; and (iii) the offences under the Act should be made cognizable.

The National Human Rights Commission undertook a comprehensive review of the existing Act and made recommendations for comprehensive amendments therein vide its Annual Report 2001-2002. The Central Government, after consulting the State Governments and Union Territory Administrations on the recommendations of the National Commission for Women and the National Human Rights Commission, had decided to accept almost all the recommendations and give effect to them by repealing and re-enacting the Child Marriage Restraint Act, 1929.

A close reading of the above objects and reasons of the Prohibition of Child Marriage Act, would keep things beyond any pale of doubt that the Prohibition of Child Marriage Act is a special enactment for the purpose of effectively preventing the evil practice of solemnization of child marriages and also to enhance the health of the child and the status of women, whereas, the Hindu Marriage Act is a general law regulating the Hindu marriages. The Prohibition of Child Marriage Act, being a special law, will have overriding effect over the Hindu Marriage Act to the extent of any inconsistency between these two enactments. In view of the said settled position, undoubtedly, Section 3 of the Prohibition of Child Marriage Act will have overriding effect over the Hindu Marriage Act. The above provision makes it very clear that irrespective of whether the child marriage is voidable or not under Personal Law, makes every child marriage voidable at the option of a party to the marriage, who was a child at the time of marriage. The important aspect of this provision is that a petition for annulling a child marriage by a decree of nullity can be filed only by a party to the marriage, who was a child at the time of marriage. Nobody other than a party to the marriage can petition for annulment of the marriage. If, within two years from the date of attaining eighteen years in the case of a female and twenty-one years in the case of a male, a petition is not filed before the District Court under Section 3 (1) of the Prohibition of Child Marriage Act for annulling the marriage, the marriage shall become a full-fledged

valid marriage. Similarly, after attaining eighteen years of age in the case of female, or twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage. If the marriage is annulled as per Section 3 (1) of the Prohibition of Child Marriage Act, the same shall take effect from the date of marriage and, in such an event, in the eye of law there shall be no marriage at all between the parties at any point of time. A plain reading of Section 3 of the Prohibition of Child Marriage Act would make it clear that such child marriage is only voidable. Therefore, it is established that though such a voidable marriage subsists and though some rights and liabilities emanate out of the same, until it is either accepted expressly or impliedly by the child after attaining the eligible age or annulled by a court of law, such voidable marriage, cannot be either stated to be or equated to a valid marriage_ stricto sensu as per the classification referred to above.

As per the Hindu Minority and Guardianship Act, 1956, in the case of an unmarried girl the father shall be the natural guardian and after him the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. As per sub-section 6(c) of the Hindu Minority and Guardianship Act, in the case of a married minor girl, the husband shall be the natural guardian. Undoubtedly, in the case of a void marriage under the Hindu Marriage Act, since the same is void ab initio, the parties never attain the status of the husband and wife. Similarly, under section 12 of the Prohibition of Child Marriage Act, a child marriage in certain circumstances has been declared as void. Therefore, a child marriage which falls within the ambit of Section 12 of the Act also shall not give the status of husband and wife to the parties to the child marriage. The male who contracts a marriage with a female child falling within the ambit of Section 12 is not a husband of the minor in the legal sense and, therefore, as per The Hindu Minority and Guardianship Act, 1956 he will not acquire the status of the natural guardian of such child at all. This requires a great deal of discussion on the legislative history of the Hindu Minority and Guardianship Act. A child marriage was recognized as a valid marriage in Hindu Law despite the implementation of the Child marriage Restraint Act, 1929. The child marriage was

recognized as a valid marriage by the said express provision. Thus, 'between' 1955 to 1978 by virtue of the express provision relating to the child marriage such marriage was recognized as a valid marriage. For the first time, as a reformist's measure, child marriages have been declared as voidable marriages only under the Prohibition of Child Marriage Act. It is noticeable that though the National Commission for Women recommended for making a provision to declare such child marriages as void marriages, the Parliament in its wisdom made it only a voidable marriage. Thus, it is crystal clear that child marriages were recognized as valid marriages till 10.01.2007 and thereafter, they have been declared as voidable whether solemnized before or after the commencement of the Act. Therefore the scenario prior to the advent of the Hindu Marriage Act, 1955, was that the child marriages were all recognized as valid in law. The Hindu Minority and Guardianship Act came into effect from 25.08.1956. The scenario as on the date of coming into force of the said Act was that as per the express provisions contained in section 5(iii) of the Hindu Marriage Act, the marriage of a child was valid and thus the male spouse of the said marriage undoubtedly acquired the status of the husband. Therefore, while enacting the Hindu Minority and Guardianship Act, 1956, the Parliament rightly thought it fit to make the husband of the minor wife as the natural guardian. Section 6(c) of Hindu Minority and Guardian ship Act 1956 states that the natural guardian of a married minor girl shall be the husband. Thus, on such marriage, the husband would replace the father and the mother from the natural guardianship. Now the entire scenario has changed after the advent of The Prohibition of Child Marriage Act, 2006. Section 3 of the Prohibition of Child Marriage Act, since the marriage is voidable, the bridegroom of the female child who had procured the marriage will not attain the status of the husband like that of any other husband of a valid marriage and, therefore, under Section 6(c) of the Hindu Minority and Guardianship Act, he cannot be the natural guardian. However, when the Parliament took note of the provisions of the Hindu Marriage Act and amended even Section 18 of the Act by Act 6 of 2007 it did not think it fit to amend Section 6(c) of The Hindu Minority and Guardianship Act. Though Section 6 (c) has not been repealed and though the same is in the statute book, still,

the same is to be re-looked in the present scenario, more particularly, in the context of the Prohibition of Child Marriage Act. There have been several studies conducted and papers submitted on the ill-effects of child marriages. Dr.Anitha Raj , a Doctor at Boston University School Public Health in Massachusetts: in her article entitled "the effect of maternal child marriage on morbidity and mortality of children under five in India; cross sectional study of a nationally representative sample". Child marriage has serious consequences for national development, stunning education and vocational opportunities for a large sector of the population. Furthermore, marriage at a very young age has grave health consequences for both the young women and their children. Thus, it is established that section 6(c) of the Hindu Minority and Guardianship Act, impliedly stands repealed by the provisions of the Prohibition of Child Marriage Act and so, it cannot be held any more that the bridegroom of a marriage with a female child is the natural guardian of such minor female child. It is also important to state that since a child marriage as defined in the Prohibition of Child Marriage Act itself is an offence and the same is cognizable, it does not require any complaint to the police to register a case and to investigate. On any information regarding such a child marriage, the Police have got a legal duty to register a case and to prosecute the offender by filing an appropriate final report. If the contracting party to the marriage of a female child is a male who is not a child undoubtedly, he is an offender punishable under section 9 of the Act. The scheme of the Act would go to show that punishment has been provided only against an adult male marrying a female child but an adult female marrying a male child is not an offender as she does not fall within the ambit of section 9 of the Act. Sections 10 and 11 provide for punishment for solemnizing a child marriage and promoting or permitting solemnization of child marriages. So, it needs to be underscored that only the male namely the husband is liable to be punished and not the girl whether child or an adult. This scheme of the Act would also go to support the view that an adult male who marries a female child cannot be allowed to enjoy the fruits of such marriage because the solemnization of the marriage itself is an offence insofar as the male is concerned. If we have to accept the contention that as per section 6(c) of the Hindu

Minority and Guardianship Act, the husband of a female child shall be the natural guardian, it will only amount to giving premium for the offence committed by the male. When the law aims at eradicating the evil menace of child marriages, declaring the adult male who marries a female child, as her natural guardian would only defeat the very object of the Act. A law cannot be interpreted so as to make it either redundant or unworkable or to defeat the very object of the Act. Thus, by committing an offence punishable under Section 9 of the Act, the adult male cannot acquire the legal status of the natural guardian of the female child. In view of these discussions, we hold that Section 6(c) of the Hindu Minority and Guardianship Act stands impliedly repealed by the Prohibition of Child Marriage Act. Therefore, we conclude that an adult male who marries a female child in violation of section 3 of the Prohibition of Child Marriage Act shall not become the natural guardian of the female child.

With the aforesaid conclusion, let us now move on to the question of custody of a female child whose marriage has been procured in violation of the provisions of the Prohibition of Child Marriage Act. As per section 2 of the Hindu Minority and Guardianship Act, the provisions of the same shall be in addition to and not in derogation of The Guardians and Wards Act, 1890. There is no specific provision made in the Hindu Minority and Guardianship Act in respect of custody of a wife, who is a child. But, under section 12(3) of the Guardians and Wards Act, the court namely, the District Court shall not place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with consent of her parents, if any. This provision makes it abundantly clear that even assuming that as per section 6(c) of The Hindu Minority and Guardianship Act, the husband is the natural guardian, even then, temporary custody of the minor wife cannot be given to him unless she is already in his custody with the consent of her parents. Thus, unless these twin conditions namely, the consent of her parents and being in the custody already are satisfied, even the temporary custody of a female child cannot be entrusted to her husband. After the advent of the Prohibition of Child Marriage Act, the vigor of Section 12(3) is more. When the competent court namely, the

District Court itself has not been authorized to entrust the custody of a minor wife to her husband, unless the twin conditions are satisfied, it is needless to point out that after the advent of the Prohibition of Child Marriage Act, until the female child of such child marriage elects to accept the marriage on attaining the age of 18 years , her custody cannot be entrusted to the male party to the marriage more so because he is not the natural guardian of the female child. Simply because an individual happens to be a natural guardian or guardian of any other category, he does not have indefeasible right to have the custody of the minor. Being a natural guardian is only one of the factors which need to be taken while considering the question of custody. All the circumstances prevailing put together should be weighed and the court should decide as to how the interests of the minor and his welfare could be well protected by granting custody.

The salient features of the PCM Act, 2006 are as follows:-

(i) To make a provision to declare child marriage as voidable at the option of the contracting party to the marriage, who was a child?

(ii) To provide a provision requiring the husband or, if he is a minor at the material time, his guardian to pay maintenance to the minor girl until her remarriage.

(iii) To make a provision for the custody and maintenance of children born of child marriages.

(iv) To provide that notwithstanding a child marriage has been annulled by a decree of nullity under the proposed section 3, every child born of such marriage, whether before or after the commencement of the proposed legislation, shall be legitimate for all purposes.

(v) To empower the district Court to add to, modify or revoke any order relating to maintenance of the female petitioner and her residence and custody or maintenance of children, etc.

(vi) To make a provision for declaring the child marriage as void in certain circumstances.

(vii) To empower the Courts to issue injunction prohibiting solemnization of marriages in contravention of the provisions of the proposed legislation.

(viii) To make the offences under the proposed legislation to be cognizable for the purposes of investigation and for other purposes.

(ix) To provide for appointment of Child Marriage Prevention Officers by the State Governments.

(x) To empower the State Government to make rules for effective administration of the legislation" regarding the natural father or the mother of the girl.

A husband under the Hindu Minority and Guardianship Act, 1956 is the guardian of the minor wife. Obviously, the husband, in such a situation, will not and cannot act as a guardian and move a petition on behalf of his minor wife. "Guardian" in this case will mean the natural father or the mother of the girl. PCM Act being a "special Act" and subsequent legislations to this extent and in case there is any conflict, will override the provisions of HMA Act. It is clear there from that marriage of a minor child is treated as void only under the circumstances mentioned in Section 12. Otherwise, this Act does not make the marriage of the child void but voidable at the option of the parties to an underage marriage which option can be exercised within the stipulated time. It is intriguing that the legislature accepted the menace of child marriage. It even accepted that the child marriage is violation of human rights. The legislature even made the child marriage a punishable offence by incorporating provision for prosecution and imprisonment of certain persons.

At the same time, except in certain circumstances contemplating under Section 12 of the Act, the marriage is treated as voidable. These provisions containing legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgement of such legal rights itself and providing a validity of Child Marriage defeats the legislative intention to curb the social evil of Child Marriage. The following are the loop hole of PCM Act.

Firstly, Child Marriages are made voidable at the option at the parties but not completely void. That means Child Marriages are still lawful. Making such marriages voidable doesn't really help matter in most cases as girls on attaining majority don't have the agency or adequate support from their families to approach the court and go for annulment of the marriage. The reason behind not making such marriages void probably is that child marriages, once solemnized and consummated makes it very difficult, if not impossible for girls to deny and step out of those marriages. Therefore, it is in keeping with the social reality that such marriages are not declared void.

If the social reality largely remains the same, the likelihood that young girls will now choose to nullify their marriages, which would probably be consummated by the time she attains maturity and decides to approach the courts, seems very unlikely.

Thirdly, registration of marriages has still not been made compulsory. Compulsory registration mandates that the age of the girl and the boy getting married have to be mentioned. If implemented properly, it would discourage parents from marrying off their minor children since a written document of their ages would prove the illegality of such marriages. This would probably be able to tackle the sensitive issue of minor marriages upheld by personal laws.

Let's move the judicial attitude regarding the custody of minor married girl/wife.

JUDICIAL RESPONSE

In 1939, the Allahbad High Court also discussed this issue. In *Moti vs Beni*[15], Beni made a complaint against one Chhotulal that he had kept Beni's daughter Chamelia in wrongful confinement. Chamelia was taken from the custody of Chhotulal and was given into the custody of the mother as per the request of Beni. During the proceedings it was know that the girl was married to Moti. Then the Magistrate directed to produce the girl before the court and handed her over to the husband. Against this order an application for revision was filed before the District Magistrate.

The District Magistrate had ordered Chamelia to the custody of the mother saying that she was yet a girl of thirteen years and she cannot be legally married and therefore the proper guardian is the mother. The matter was referred to the High Court. While setting aside the order of the District Magistrate, Justice Thomas observed that the court below acted without jurisdiction. He vehemently criticized the remark of the District Magistrate that the marriage of Chamelia with Moti was an illegal marriage. His words reflect the real status of the child marriage and the penal nature of the offence under the Act. "It is true that celebration of this marriage may have contravened the provisions of the *Child Marriage Restraint Act*, 1929; but marriage of a child is not declared by the *Child Marriage Restraint Act*, 1929 to be an invalid marriage. The Act merely imposes certain penalties on persons bringing about such marriages.[16]

In 1961, Justice S.P. Mohapatra strongly emphasized the indisputable aspect of the validity of marriage in *Birupnkshya Das vs Kujubehare*[17]; The Act does not invalidate the marriage even though it may be in contravention of the provisions of the Act.[18]

In the next year the Madras High Court categorically upheld the legal status of child marriages in *Sivandy vs Bhagwati Amma*[19], Bhagwati Amma, a girl of thirteen year who was married to Sivandy aged 15 or 16 year had not attained puberty at the time of marriage. After attaining puberty, the marriage was consummated. As Sivandy was not prepared to live with her, Bhagwati Amma filed a suit for restitution of conjugal rights. Sivandy's contention was that there was no valid marriage between him and Bhagwati Amma, though he was made to undergo a form of marriage without the consent of his father. The issue in this case was that whether they were lawfully married or whether Bhagwati Amma had a cause of action to sue for a restitution of conjugal rights. He further contended that the marriage even if true was not valid in law as it was in violation of the provisions of the Act. But Justice Jagadesen specifically declared that though the child marriage prohibited by the Act is not rendered invalid in any of the provision of the Act therein.[20]

It is interesting to note that the legislature has not change its attitude towards the legality of child marriage even in the post independent era. The Hindu Marriage Act was enacted in 1955 and contains the same age limit for bride and bridegroom at par with the *Child Marriage Restraint Act.*[21] The said Act remains silent about the legal validity of the child marriage and continues the earlier penal policy adopted in the *Child Marriage Restraint Act* in case of violation.[22] The legislative policy adopted by the colonial Government has been followed even after fifty three years of independence without any change. The judicial decisions also support the view that the validity of the marriage is not affected by the violation of age rule. In *Kalawati vs Devi Ram*[23], the Judicial Commissioner of Himachal Pradesh declared that the marriage in violation of the age rule prescribed under the Hindu Marriage Act would be neither void nor voidable. Judicial Commissioner Capoor emphatically declared that the minority of the wife or of her guardian itself is not a ground for getting it declared null and void.[24] He affirmed his view in his next decision *Naumi vs Narotam*[25] Realizing the unnecessary hardship and consequences of making the child marriage void, the legislature may have intentionally omitted incorporating any provision dealing with invalidity of child marriage in the Hindu Marriage Act.

In *Premi vs Dayararn*[26], Judicial Commissioner Om prakash rightly shared this view saying that it is not the duty of the court to fill the gaps intentionally left by the legislature.

"A marriage which contravenes the condition specified in clause (iii) of Section 5 of the Act is not declared void by Section 11 or any other Section of the Act. The omission to declare such a marriage to be void by Section 11or any other Section does not appear to be merely accidental. The legislature has provided punishment under Section 18 of the Act, for the breach of the aforesaid conditions. It is not for the court to speculate upon the reasons for the aforesaid intentional omission. But it may not be that the legislature did not intend to declare child marriages contravening the condition about age, specified in clause (iii) of Section 5 as void, as though such marriages are discouraged by society and law, yet the

evil is deep rooted and child marriages are not rare in the country and declaring such marriages as void must have resulted in unfortunate consequences and unnecessary hardship to the parties."[27]

In another case *Ma Hari vs Director of Consolidation*[28], Justice Satish Chandra of the Allahabad High Court observed that the solemnization of marriage in contravention of the provisions of the Hindu Marriage Act may result in punishment, yet the marriage would not become null and void and the marriage would remain valid in Law and enforceable and recognizable in a court of law. Justice *S. Acharya* of the Orissa High Court shared the same view in *Buda Sahu vs Laburani Sahuni.*[29] However, in *Budhan vs Manraj*[30], the court adopted the opposite view while considering the issue of restitution of conjugal rights that the marriage may not be valid if performed in contravention of the age rule but the invalidity cannot be pleaded as an answer to a petition for restitution of conjugal rights. This judicial interpretation which was in sharp contrast to the earlier judicial trend was discussed in the 59th Report of the Law Commission[31] and the Commission emphasized the general understanding that child marriage is valid."[32] In *Mohinder Kaur vs* Major *Singh*[33] the Division Bench of the Punjab and Haryana High Court consisting of JJ Pandit and Gopal Singh vehemently emphasized that the marriage in contravention of age rule is not a nullity and hence such contravention cannot be pleaded as a defence to a petition for restitution of conjugal rights. It was further observed that the infringement of clause (iii) of Section 5 did not affect the tie of marriage and render the marriage either void or voidable.[34]

Realizing the hidden impact of the child marriage, the Andhra High Court in *P.A. Saramma vs Ganapatlu*[35], took a revolutionary step by holding the marriage in violation or the age rule as invalid. For the first time, in 1975 the Division Bench of the Andhra High Court declared marriage in contravention of the age rule prescribed under the Hindu Marriage Act to be void ab *inilio.* In this case six year old Saramma was married to 11 year old Ganapatlu. The father of the girl executed a settlement deed conferring certain rights on his daughter and son in

law. Subsequently some misunderstanding arose and the father of the girl turned out Ganapatlu from his house and revoked the settlement. After that he issued a registered notice to Ganapatlu repudiating their marriage. Ganapatlu filed an application for restitution of conjugal rights. Rejecting the contention of Saramma that there was no marriage at all, or even if there has been marriage it was void, the lower court upheld the validity of the marriage. Then Saramma filed an appeal before the High Court. It was contented by Ganapatlu that as there is no reference to clause (iii) of Section 5 either in Section 11 (void) or Section 12 (voidable marriages), the question of declaring a marriage solemnized between two minors as null and void does not arise. Besides, for the infringement of the provision, Section 18 provides punishment. Rejecting this contention Chief Justice *Obul Reddi* declared that the marriage in violation of the age rule under the Hindu Marriage Act is void and is no marriage in the eye of law. It is further observed that the object of the Hindu Marriage Act is to prevent and eradicate child marriages[36] and that is why the age rule is prescribed. It is also to be noted that for a minor's marriage, decree of nullity would not be required, since it would be a nullity in itself.[37] specifically disagreeing with earlier Himachal Pradesh ruling[38] Chief Justice Obul Reddi declared that, "If that view was accepted it will open the flood gates of child marriages."

However, the Court did not give any adequate and cogent reason for its findings. There was no explicit reference to the reasoning. The decision had serious far reaching consequences especially on the rights of child. The fate of children born of such marriage, in the light of this ruling, is said to be drastic. 'They would become illegitimate and unprotected by the statute. Though a limited legitimacy is provided for illegitimate children, under Section 16[39] of the Hindu Marriage Act, it will not be able to rectify the position of the illegitimate children of underage marriages as it only refers to Section 11 and Section 12 of the Hindu Marriage Act when conferring the legitimacy to the children of void and voidable marriages. Nothing is said about the fate of these illegitimate children in the judgment. Hence in the absence of any provision in the Act or judgment the status of legitimacy will remain away from the issues of such a marriage which will be

detrimental to the rights of such innocent children; they would remain to be bastards.

However, in the next year while deciding a petition on restitution of conjugal rights in *Gindan vs Barilal*[40], Justice Tankha affirmed the validity of the child marriage and the penal nature of the offence.[41] In 1977, the Full Bench of Andhra High Court in *Venkata Ramana vs State*[42] overruled the earlier *Saramma vs Ganapatlu* and categorically upheld the validity of child marriages in India. In this case the wife had made a complaint against the husband under Section 494 of the Indian Penal Code as he contracted a second marriage. The age of the husband and wife at the time of marriage was thirteen and nine years respectively. The defence of the husband was the first marriage as null and void, as it infringed the age rule as required for a valid marriage and he relied on Saramma's case.

The Full Bench observed that the violation of clauses (iv) and (v) of Section 5 of the Hindu Marriage Act renders the marriage null and void, whereas, it is silent about the effects of violation of clause (iii) of the Section 5 of the Hindu Marriage Act. Neither Section 11 nor Section 12 makes any reference to the violation of conditions relating to age rule. The silence of the legislature about the legal effect of violation of clause (iii) except the penal liability clearly reveals the absence of legislative intention to invalidate child marriage. It may be noted that the position under the *Child Marriage Restraint Act* is also the same. In both the statutes, marriages in violation of the age rule cannot be considered as invalid, but only punishable. So it is clear that the intention of the legislature is only to punish the solemnization of marriage without touching the validity of the marriage. Further, by introducing the concept of option of puberty in the Marriage Laws (Amendment) Act, 1976[43] the legislature conferred implied validity on minor's marriage.[44] The incorporation of option of puberty reflects the attitude of the legislature towards the decision of *Saramma.*

After considering the statutory provision and abundant case law supporting the recognition of the validity of child marriage, the Full Bench categorically decided that the marriage solemnized under clause (iii) of Section 5 of the Hindu

Marriage Act is neither void nor voidable. The only consequence is that the persons concerned arc liable for punishment under Section 18.

Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. A Division Bench of Gujarat High Court in Patel Verabhai Kalidas *vs* State of Gujarat,[45] has extensively considered the behavior pattern of the children of age group 15 and 18 while considering the welfare of such children and has held has follows:-

It is well settled that in matter concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party.[46] And 'what is truly the welfare of minor' has to be seen.[47] Now in the present case we are clearly of the opinion that welfare and liberty of the minor girl are and will better be attended to and protected in the institution in which she has been staying under the orders passed by this court from time to time during the last more than a month.

A minor girl between her 15 to 18 years of age floats into a state of puberty, a state of innocence and yet lacking in mature understanding more guided by 'attractions'. The state of mind can hardly be described as mature. If that be not so, she can hardly leave her parents for a new entrant in her life, without being mindful of what the type of such new entrant in the life is. We cannot resist expressing our concern at the manner in which such girls are being cajoled and entrapped so as to see them out of their parental home at a premature point of time. Here the third respondent is aged around 28 years. Though according to him he is a divorcee, the first wife having committed suicide, he has described himself to be unmarried in the marriage registration form. One can hardly find any welfare of the minor girl in his association.

In N.Babu vs Sub Inspector of Police[48], in this case, the question of custody of a minor girl acts as between the husband and the parent's arise. While exercising the

jurisdiction under Article 226 of the Constitution of India, in a habeas corpus proceeding, the Division Bench presided over by Hon'ble Mr. Justice V.S. Sirpurkar [as he then was] held as follows: - Again the question of marriage and the plea of marriage at this stage has no meaning for the simple reason that it is not known under what circumstances the consent for the marriage has been given. There is no question of consent by the minor. For all practical purposes in law, the father and the mother who are the natural parents of the minor would alone be the natural guardian and at this stage when it is not decided as to whether the second respondent was justified in taking the girl along with him. If the girl is allowed to stay with the second respondent it would be giving an advantage to the second respondent of his own wrong which may not be possible for this court. The question before the court is whether the minor girl should be allowed to stay with a person who is facing a charge of her abduction or kidnapping as the case may be. The Court Observed that it may not be possible for us to allow the minor girl to stay with a person who is facing the charge under Section 366-A and or 363 of IPC for taking away of that very person. We therefore, direct the girl Amudha who is secured and is present in the court shall be put in the custody of her parents, if necessary with the aid of the police. At this stage, the learned counsel for the second respondent expresses an apprehension that the parents may harm the minor and might act against her own interests. The learned Additional Public Prosecutor assures us that a close monitoring will be made by the police for the welfare of the girl. The parents are specifically warned not to treat the minor girl in any manner prejudicial to her welfare including getting her married against her wishes.

Makemalla Sailoo vs Superintendent of Police and Ors[49]. This is an unusual case where a girl of 13 years claims to have married 3rd respondent. The petitioner is the father of the girl viz., Arpitha who was a student of 7th class. He contended that while he was sleeping outside his residence, on 26.4.2005, the 3rd respondent took away his minor daughter, and then he lodged a complaint with the police. Under section 366 and section 109 Indian Panel Code. The police could not trace out the girl. The father filed a case on 7.11.2005. The police got information that the alleged detenue and the accused were staying in Chennai. A police team went

there and traced the alleged detenue and the accused. Their statements were recorded. The husband in his statement stated that he married one Laxmi two years back against his will. Subsequently he developed relationship with the alleged detenue and eloped with her on 26/4/2005 the alleged detenue stated in her statement under section 161 of Cr.PC that she was induced by the accused to run away with him. They were brought to Devarakonda on 12.11.2005 and produced before the Magistrate. The wife refused to go with her parents, therefore the Magistrate sent her to State Home for Child Care Centre, Nimboli Adda, Hydrabad with a direction to retain her in the Home till she attains the majority or till further orders from the Court. The accused was remanded to judicial custody and he was lodged in Sub-Jailo, Devarakonda. During the course of hearing, detenue was from the State Home for Child Care Centre. She made a statement that she had studied up to 8th class, she was 13 years old and she had married 3rd respondent eight months before. Since the 3rd respondent was in custody and he was not represented, by an order dated 12.12.2005 we ordered his production. He also accepted that he had married the alleged detenue. The alleged detenue Arpitha before this Court also stated that she was not ready to go with her parents. However, there are certain offences prescribed under the Indian Penal Code with respect to taking away a child even for marriage. Section 361 of IPC makes kidnapping of a female less than 18 years an offence if she is taken from the custody of guardian without the consent of the guardian. Similarly if a marriage is performed, it can be presumed that sexual relationship will also develop and under Section 375 if a man has sexual intercourse with a woman with or without her consent under 16 years is rape. There is an exception to it that sexual intercourse by a man with his wife may not be an offence of rape if the wife was not under 15 years of age. In the present case the girl is 13 years, therefore the marriage by a minor would be contravening the various laws and the factum of marriage in itself would be an offence under various laws, but we do not agree that such marriage would be an invalid, illegal or null and void marriage. Now, the question before the court is whether the girl who is married according to her, 3rd respondent and who is not willing to go with her parent can be allowed to live with 3rd respondent

In this connection, the court relies on the provisions of the Hindu Minority and Guardianship Act, 1956. This Act has an overriding effect under Section 5 which lays down, (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) Any other law in force immediately before the commencement of this Act shall cease to have effect insofar as it is inconsistent with any of the provisions contained in this Act.

Minor is defined under Section 4(a) as a person who has not completed the age of 18 years. Section 6 defines the natural guardians of a Hindu minor and it lays down that the natural guardians of a Hindu minor, in respect of his person and property would be the father in case of a boy or a unmarried girl and then it mentions other guardians who can be guardians after the father. Under Section 6(c) it lays down that in the case of a married girl, the husband would be a natural guardian. So this Act in a way recognizes the marriages of minor girls. The Act deals with minors and mentions the husband as a guardian of a married girl. This it conveys the intention of the legislature that for a married minor girl, guardian would be the husband. There cannot be any guardian for a major under the Hindu Minority and Guardianship Act, 1956. Therefore the only meaning which has to be given to Section 6(c) is that if a minor girl is married, her natural guardian is the husband. We have no option, but to allow this girl who is only 13 years old to go with her husband, but we feel that the Legislatures have not done much to stop the child marriages which are a menace. Justice Bilal Nazki in his judgement rightly observed "We cannot expect healthy growth of the society if a child of 12 years is allowed to be married. There are so many, acts to which a reference has been given by the Court herein, before which make the child marriage an offence but, which we do not make the child marriage avoid marriage. Since the marriage which has taken place between the alleged detune and the 3rd respondent is a valid marriage in the eye of law, though it may be an offence under various provisions of various

statutes, yet the marriage cannot be nullified and under the Hindu Minority and Guardianship Act, 1956 the 3rd respondent becomes a natural guardian of the detenue. These directions we are giving with a heavy heart and reluctantly, but the existing law does not leave any scope for us to take a different view. It is for legislature to look into the serious issues. Let a copy of the judgment be sent to National Women Commission and also to State Women Commission". Therefore the writ petition is disposed of with a direction that the girl is handed over to the 3rd respondent. It is submitted that Justice Bilal Nazki bound by different statutes, but with very heavy heart and reluctantly stated that the existing laws does not leave any scope to take different view. Further, he has directed that it is the duty of the legislature to look into the very serious issue child marriages. The naturally Corollary of this case is that a minor wife is bound to live with her husband under his guardianship. The judgment is wrong in sprit as issue of guardianship should decided taking into account welfare of the minor. In a subsequent judgment, a quite contrary view was taken by division bench of Delhi High Court.

In *Jitender Kumar Sharma vs State and another*[50], wherein the Delhi High Court held as follows:

This was a case where both the boy and the girl were minors, who had fallen in love; eloped together and got married as per the Hindu rites and ceremonies. The Division Bench specifically considered the issue of validity of marriage. The Court took note of the earlier Division Bench judgments as well as the provisions of Prohibition of Child Marriage Act (PCM) Act, 2006. The Division Bench was, however, of the view that the validity of marriage is primarily to be judged from the standpoint of personal law applicable to the parties to the marriage. The Court was of the opinion that a Hindu marriage, which is not a void marriage under the HM Act 1955, would continue to be such provided the provisions of Section 12 of the PCM Act, 2006 are not attracted. A marriage in contravention of Clause (iii) of Section 5 of the HM Act was neither void nor voidable. However, Section 3 of the PCM Act had introduced the concept of a voidable marriage. This was a secular law. In view of Section 3 therefore, which made child marriages to be voidable at

the option of the contracting party being a child, the Division Bench observed that the position contained in Clause (iii) of Section 5 of the HM Act holding that such a marriage was neither void nor voidable was the legal position prior to the enactment and enforcement of PCM Act, 2006 and after this enactment the marriage in contravention of Clause (iii) of Section 5 of the HM Act would not be ipso facto void but could be void. Merely on account of contravention of clause (iii) of Section 5 of the HMA, Poonam's marriage with Jitender is neither void under the HMA nor under the Prohibition of Child Marriage Act, 2006. It is, however, voidable, as now all child marriage is, at the option of both Poonam and Jitender, both being covered by the word "child" at the time of their marriage. But, neither seeks to exercise this option and both want to reinforce and strengthen their marital bond by living together. The Court also find that stronger punishments for offences under the Prohibition of Child Marriage Act, 2006 have been prescribed and that the offences have also been made cognizable and non-bailable but, this does not in any event have any impact on the validity of the child marriage. This is apparent from the facts that while the legislature brought about these change on the punitive aspects of child marriages if at the same time brought about conscious changes to the aspects having a bearing on the validity of child marriages. It made a specific provision for void marriages under certain circumstances but did not render all child marriages void. It also introduced the concept of a voidable child marriage. The flip-side of which clearly indicated that all child marriages were not void. For, one cannot make something voidable which is already void or invalid."

A reading of Guardian and Ward Act 1890 Act and Hindu Minority and Guardianship Act 1956 Act together reveals the guiding principles which are to be kept in mind when considering the question of custody of a minor child. The Court has seen that the natural guardian of a minor Hindu girl who is married is her husband. Furthermore, that no guardian of the person of a minor married female can be appointed where her husband is not, in the opinion of the court, unfit to be the guardian of her person. The preferences of a minor who is old enough to make an intelligent preference ought to be considered by the court. Most importantly, the welfare of the minor is to be the paramount consideration. In fact, insofar as the

custody of a minor is concerned, the courts have consistently emphasized that the prime and often the sole consideration or guiding principle is the welfare of the minor.

In *Association for Social Justice & Research vs Union of India & others*[51] the Court also took note of this menace, inter alia, pointing out as under:

Sociologists even argue that for variety of reasons, child marriages are prevalent in many parts of this country and the reality is more complex than what it seems to be. The surprising thing is that almost all communities where this practice is prevalent are well aware of the fact that marrying child is illegal, nay; it is even punishable under the law. NGOs as well as the Government agencies have been working for decades to root out this evil. Yet, the reality is that the evil continues to survive. Again, sociologists attribute this phenomenon of child marriage to a variety of reasons.

The foremost amongst these reasons are poverty, culture, tradition and values based on patriarchal norms. Other reasons are: low-level of education of girls, lower status given to the girls and considering them as financial burden and social customs and traditions. In many cases, the mixture of these causes results in the imprisonment of children in marriage without their consent. The present case is a telling example, which proves the sociologists correct. Having regard to the provisions of the Prohibition of the Child Marriage Act, 2006 and after having taken note of the Sociological and psychological as well as physiological aspects of such marriages and their consequences, the Bench did not agree with Jitendar Kumar Sharma's case.

Kokkula Suresh vs state of Andhra Pradesh and others.[52] In this case writ petition filed by a husband challenging the order of a magistrate where his married wife was ordered to be sent to a sate home, the court observed that on a combined reading of section 5(iii) read with section 11, 12 and 18 of the Hindu Marriage Act 1955 and Section 4 (a) and Section 6 (c) of Hindu Minority and Guardianship Act 1956, it is found that the petitioner who is husband of minor girl is her natural guardian and consequently her custody shall be given to the petitioner. The court

further observed that the petitioner wife though a minor at the time of marriage, in her statement before the Court she had categorically stated that she voluntarily along with the petitioner and that they got married and that she was not willing to go with her parents. Since, the marriage is valid between the petitioner and his wife therefore the petitioner is the natural guardian under the Hindu Minority and Guardianship Act 1956, the petitioner alone is entitled to have the custody of minor wife.

In *Avinash Singh vs State of Karnataka*[53], a Division Bench of Karnataka High Court, after noticing the provisions of Section 5 of the Hindu Marriage Act, 1955 and the provisions of Sections 361 and 363 of IPC while considering the case of a minor girl married by an adult boy, the Bench dismissed the petition filed by the husband on the ground that the boy had committed an offence under Section 361 of IPC and therefore, he was not entitled for the custody of the minor girl.

T. Sivakumar vs The Inspector of Police on 3 October, 2011[54]

This Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Habeas Corpus against the respondent who secure the petitioner minor daughter namely Sujatha, aged 17 years. The petitioner alleges that respondent kidnapped his daughter at the house of petitioner sister. In pursuance of this division bench ordered notice to the respondent and the girl who was with him. The girl appeared before the court and said that she had willfully left her house and she had got married with her own free will. Having considered the rival submissions, the Division Bench presided over by Mr. Justice C. Nagappan directed the minor detenue to be kept in a Government Children's Home. The question raised before the court were

(i) Whether a marriage contracted by a person with a female of less than 18 years could be said to be valid marriage and the custody of the said girl is given to the husband?

(ii) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?

(iii) If yes, can she be kept in the protective custody of the State?

(iv) Whether in view of the provisions of Juvenile Justice [Care and Protection of Children] Act, 2000, a minor girl, who claims to have solemnized her marriage with another person would not be a juvenile in conflict with law and whether in violation of the procedure mandated by the Juvenile Justice [Care and Protection of Children] Act, 2000, the Court dealing with a Writ of Habeas Corpus , has the power to entrust the custody of the minor girl to a person, who contracted the marriage with the minor girl and thereby committed an office punishable under Section 18 of the Hindu Marriage Act and Section 9 of the Prohibition of Child Marriage Act, 2006 ?

(v) Whether the principles of Sections 17 and 19(a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the Hindu Marriage Act?

The division bench passed an interim order and permitted the girl to stay in government home for children. Keeping in mind the protection and interest of the girl the court handed over the custody of this girl to the non government organization, Mariyala. Until further orders of the court the girl was permitted to attend the college from there. The High Court division bench observed that since, the parties to the marriage in this case are admittedly Hindus. So, we confine our discussion in the context of the law applicable to Hindus alone. The division was of the view that if only a petition is filed under section 3 of the PCM Act 2006, the said marriage will be voidable but, the full bench of Madras High Court disagree with the conclusion of the division bench. The legal position or the scheme of the Hindu Marriage Act as follows. The expressions 'husband' and 'wife' have not been defined anywhere in this Act. But, in Sections 9 and 13 of the Act these two expressions have been used. Incidentally, the full bench notice that, reliefs under sections 9 and 13 of the Act are available only to parties to a valid marriage. It is by virtue of such valid marriage, the parties to the marriage acquire the status of husband and wife. Obviously, this is the reason why, in sections 9 and 13 of the

Act, the legislature used the expressions 'husband' and 'wife'. But, the legislature has intentionally omitted to use these expressions viz., husband and wife in sections 11 and 12 of the Act. In section 11, the expression used is 'either party thereto against the other party'. In section 12, the expressions used are 'petitioner' and 'respondent'. There can be no doubt that parties to a void marriage do not acquire the status of husband and wife at all since the marriage is ipso jure void. It is because of this reason, in section 11 of the Act, the legislature has consciously omitted the expressions 'husband' and 'wife' and instead has used the expressions either party thereto against the other party. Similarly, in section 12 of the Act, had it been the intention of the legislature to give the parties to a voidable marriage, the full status of husband and wife, the legislature would have used the expressions 'husband' and wife'. The omission to use these two expressions in section 12 perhaps would only reflect the intention of the legislature not to give the full status of the husband and wife to the parties to a voidable marriage, like the spouses of a valid marriage. Sections 9 and 13 are in pari materia in so far as the expressions referable to the parties to the marriage are concerned, whereas sections 11 and 12 are in pari materia in terms of the expressions referable to the parties to a voidable marriage. The full bench further observed that if we look into the provisions of the Prohibition of the Child Marriage Act, it is obvious that here also, the legislature has consciously omitted the expressions 'husband' and 'wife'. In particular, in section 3 of the Act, the expression 'contracting party' has been used. The term 'contracting party' is defined in section 2 (c) of the Act which states that a contracting party, in relation to a marriage means either of the parties whose marriage is or about to be thereby solemnized. Thus, to some extent, Section 3 of the Prohibition of Child Marriage Act is in pari materia with Sections 11 and 12 of the Hindu Marriage Act insofar as the expressions referable to the parties to the marriage are concerned. This would again go to strengthen our conclusion that the male who contracts a child marriage of a female child cannot attain the full status of a husband like a husband of a fully fledged valid marriage." The full bench has given the answers of the division bench questions in the following manner.

Issue No 1- whether a marriage contracted by a person with a female of less than 18 years could be said to be valid marriage and the custody of the said girl be given to the husband the full bench of Madras high court has observed that a plain reading of Section 3 of the Prohibition of Child Marriage Act would make it clear that such child marriage is only voidable. The full bench of the High Court held that though such a voidable marriage subsists and though some rights and liabilities emanate out of the same, until it is either accepted expressly or impliedly by the child after attaining the eligible age or annulled by a court of law, such voidable marriage, cannot be either stated to be or equated to a valid marriage stricto sensu. The later part of the 1st question referred to us which states as to whether the custody of the said girl is given to the husband [if he is not in custody]. This question is inter-linked with the 2nd question which states as to whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody. Therefore, the full bench dealt with these two questions together. As per the Hindu Minority and Guardianship Act, 1956, in the case of an unmarried girl the father shall be the natural guardian and after him the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. As per sub-section 6(c) of the Hindu Minority and Guardianship Act, in the case of a married minor girl, the husband shall be the natural guardian. Undoubtedly, in the case of a void marriage under the Hindu Marriage Act, since the same is void ab initio, the parties never attain the status of the husband and wife. Similarly, under section 12 of the Prohibition of Child Marriage Act, a child marriage in certain circumstances has been declared as void. Therefore, a child marriage which falls within the ambit of Section 12 of the Act also shall not give the status of husband and wife to the parties to the child marriage. The male who contracts a marriage with a female child falling within the ambit of Section 12 is not a husband of the minor in the legal sense and, therefore, as per The Hindu Minority and Guardianship Act, he will not acquire the status of the natural guardian of such child at all.

But, in the case of a voidable marriage, whether the male contracting party to the marriage will attain the status of husband for the purposes of Section 6 of the Hindu Minority and Guardianship Act. The full bench of High Court had relied on *Gaurav Nagpal vs Sumedha Nagpal*[55], *Patel Verabhai Kalidas vs State of Gujarat*[56]. *N. Babu vs Sub Inspector of Police*[57] and reached on conclusion that the courts were almost uniform in their opinion that the husband of a minor child is entitled for the custody of the minor wife. In the post Prohibition of Child Marriage Act scenario we are able to see considerable change in the approach of various High Courts. As we have referred to above a Division Bench of the Karnataka High Court has gone to the extent of declining to grant custody of the minor wife to the husband on the ground that the husband is an offender. In view of the said position, we are of the view that it will be very safe to hold that after the advent of the Prohibition of Child Marriage Act since the male contracting party to a child marriage does not attain the full status of the husband until the child attains the eligible age, like a husband of a full-fledged valid marriage and consequentially since he is not the guardian of the female child of such child marriage, he is not entitled for the custody of the minor. If a different interpretation is adopted to say that such husband is entitled for the custody of minor wife will only defeat the very object of the Act. This is our answer to the latter part of the 1st question referred to us.

Issue No 2nd –Second question whether a minor could be said to have reached the aged of the discretion, the Court observed Section 17(3) of the Guardians and Wards Act which states that one of the matters to be considered by the court in appointing guardian is, if the minor is old enough to form an intelligent preference, the court may consider that preference also. Whether a minor has attained the intelligent preference is a question of fact which depends upon the capacity of the minor in each case. It cannot be put in a straight-jacket formula. As per the law laid down by the Hon'ble Supreme Court though the wish of the minor is also a factor to be taken into consideration by the Court while deciding the custody of the minor, it is not the only matter which is to be taken into consideration. Therefore,

the minor cannot walk away to her whims and fancies from the lawful guardianship of her parents.[58]

The underlying rule is almost in pari materia with Section 17 of the Guardians and Wards Act 1890. The full bench has very rightly explained the importance of section17 of Guardian and Ward Act and observed that "if the child, who has capacity to determine, expresses her wish not to go with her parents, it may not be appropriate for the court to compel her to go to the custody of her parents . The court may keep her in appropriate custody like, custody in a welfare home for children in need of care and protection set up under the Juvenile Justice [Care and Protection] Act. Here, it should not be misunderstood that the child could be sent either to a special home or an observation home which are meant for juveniles in conflict with law under the Juvenile Justice [Care and Protection of Children] Act. The full bench make it clear that a female child who is a victim of child marriage, if expresses her wish not to go with her parents, the court may direct such female child be kept in a separate home for children in need of care and protection established under the Juvenile Justice [Care and Protection Act] and not in a special home or observation home meant for juveniles in conflict with law".

Issue No 3rd – Whether the minor child can be kept in protective custody of the State? The full bench held that "if the welfare of the minor child will be well protected if she is kept in the protective custody of the State, the court can resort to such course".

Issue No 4th - _Whether the minor girl who claims to have solemnized her marriage with another person would not be a juvenile in conflict with law? The Court further held that a juvenile in conflict with law is the one who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Here, the minor, who enters into a marriage is not an offender under any of the provisions of the Prohibition of Child Marriage Act, 2006. Neither the minor girl is an offender under section 18 of the Hindu Marriage Act. The said provision states that every person who procures a marriage of himself or she is punishable. Here, the minor girl does not procure the marriage

and instead her marriage is procured by the others. Thus, , such a minor girl is not a juvenile in conflict with law.

Issue No 5th- Whether the principles of Sections 17 and 19(a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the Hindu Marriage Act. As held by the Hon'ble Supreme Court in Anjali Kapoor's[59] case and held that no minor can be the guardian of the person of another minor except his own wife or child. Furthermore, that no guardian of the person of a minor married female can be appointed where her husband is not, in the opinion of the court unfit to be her guardian of her person. Sections 17 and 19 of the Guardians and Wards Act can also be taken for guidance while deciding the question of custody of a minor girl whose marriage has been celebrated.

In conclusion, to sum up, full bench answers to the questions referred to by the Division Bench is as follows:

(i) The marriage contracted by a person with a female of less than 18 years is void able and the same shall be subsisting until it is annulled by a competent court under section 3 of the Prohibition of Child Marriage Act. The said marriage is not a _valid marriage stricto sensu as per the classification but it is not invalid. The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage stricto sensu, instead he will enjoin only limited rights.

(ii) The adult male contracting party to a child marriage with a female child shall not be the natural guardian of the female child in view of the implied repealing of section 6(c) of the Hindu Minority and Guardianship Act, 1956.

(iii) The male contracting party of a child marriage shall not be entitled for the custody of the female child whose marriage has been contracted by him even if the female child expresses her desire to go to his custody. However, as an interested person in the welfare of the minor girl, he may apply to the court to set her at liberty if she is illegally detained by anybody.

(iv) In a habeas corpus proceeding, while granting custody of a minor girl, the court shall consider the paramount welfare including the safety of the minor girl not withstanding the legal right of the person who seeks custody and grant of custody in a habeas corpus proceeding shall not prejudice the legal rights of the parties to approach the civil court for appropriate relief.

(v) Whether a minor girl has reached the age of discretion is a question of fact which the court has to decide based on the facts and circumstances of each case.

(vi) The minor girl cannot be allowed to walk away from the legal guardianship of her parents. But, if she expresses her desire not to go with her parents, provided in the opinion of the court she has capacity to determine, the court cannot compel her to go to the custody of her parents and instead, the court may entrust her in the custody of a fit person subject to her volition.

(vii) If the minor girl expresses her desire not to go with her parents, provided in the opinion of the court she has capacity to determine, the court may order her to be kept in a children home set up for children in need of care and protection under the provisions of the Juvenile Justice [Care and Protection] Act and at any cost she shall not be kept in a special home or observation home meant for juveniles in conflict with law established under the Juvenile Justice [Care and Protection] Act, 2000.

(viii) A minor girl whose marriage has been contracted in violation of section 3 of the Prohibition of Child Marriage Act is not an offender either under Section 9 of the Act or under Section 18 of the Hindu Marriage Act and so she is not a juvenile in conflict with law.

(ix) While considering the custody of a minor girl in a habeas corpus proceeding, the court may take into consideration the principles embodied in Sections 17 and 19(a) of the Guardians and Wards Act, 1890 for guidance.

The full bench highlights the serious Anomoly in section 3 clause3 of the PCM Act. Child marriages to be voidable at the option of contracting party being a child:

The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

A plain reading of sub section (3) would reflect that a petition under the above Section may be filed at any time but before the child completes two years of attaining majority. When does a child attains the age of majority is not expressly defined in the Act. However, Section 2 (f) of the Prohibition of Child Marriage Act denies the term minor which reads as follows:-

The minor means a person who, under the provisions of the Majority Act, 1875 (9 of 1875) is to be deemed not to have attained his majority.

As defined in Majority Act, 1875, a minor, either male or female, attains the age of majority on completing eighteen years of age. Keeping in mind the same, if we again look into sub section (3) of section 3 of the Prohibition of Child Marriage Act, the anomaly in the Act will emerge to light. In the case of a female , as per sub section (3) since she attains the age of majority on completing the age of eighteen years, there can be no difficulty in understanding of the said provision to say that a petition for annulment should be filed within two years of attaining majority, i.e. before completing twenty years of age. But, in the case of a male, any marriage solemnized before he completes the age of twenty one years is a child marriage and the same is voidable. Therefore, he can be expected to file a petition for annulment within two years after attaining the age of twenty-one years. But, sub section (3) reads that such petition should be filed when he completes two years of attaining majority which means before completing twenty years of age. For example, if the child marriage of a male takes place on his completing twenty years of age and if a literal interpretation is given to sub section (3) of the Prohibition of Child Marriage Act, surely, he will not be in a position to file a petition to annul the marriage. Such literal interpretation in the case of a male would create anomalous situation. It is too well settled that no provision of any law

shall be interpreted in such a way to make it either anomalous or unworkable. Therefore, in our considered opinion, sub section (3) of section 3 shall be read that in the case of a male, a petition for annulment of child marriage shall be filed before he completes two years of attaining twenty-one years of age. We are hopeful that the parliament will take note of the above anomaly and make necessary amendment to sub section (3) to avoid any more complication. While sending back the case to the Division Bench for disposal, the Judges said adequate publicity should be given for Prohibition of Child Marriage Act. The government should instruct educational institutions to counsel students in their teens and parents on the ill-effects of child marriages.

The researcher does not agree with the decision of the Court as the Court direct the custody of minor girl to the Nirmal Chayya or special home/observation home meant for juviniles in conflict with Law because these homes are not functioning properly and there is grave risk of rape and deaths in these houses. For keeping in mind the welfare and protection of minor girl`s interest. The researcher is of the view that the Court must consider that whether she is intelligent enough to make her choices because A minor girl between her 15 to 18 years of age floats into a state of puberty, a state of innocence and yet lacking in mature understanding more guided by 'attractions'. The state of mind can hardly be described as mature. If that be not so, she can hardly leave her parents for a new entrant in her life, without being mindful of what the type of such new entrant in the life is. So the court cannot resist expressing their concern at the manner in which such girls are being cajoled and entrapped so as to see them out of their parental home at a premature point of time. So, it is essential to note the Court must consider also the minor social economic protection of interest while awarding the minor married girl. The Court should handover the girl to their parental home with some directions for the benefit of minor girl. The researcher further submits that it is well settled Law before these judgment that husband has right to custody of minor wife but, after this judgment the position is changed. The matter came before the Court that the girl was 17 years old and she was right to make preference of making person illegible for her custody but, in case of minor

marriages where the child's age is below the 10 years such as in case of Rajasthan where almost marriages are performed under 10 years. Now, the question is who will be the minor of those married girls either her parent or her husband. As we have seen that in Rajasthan the married girl before the age of puberty remains with the parents and after this age according to the customary practice named as Gunna the husband is entitled for the custody of her minor married girl. The legitimacy of Gunna highlights by the following judgments.

In *Munshi Ram vs Emperor*[60] the, daughter of one Ram Chander was married to one Munshi Ram's minor son. The marriage ceremony was completed with the observance of all rituals connected with the marriage. The Court pointed out that the *gauna*[61] ceremony is not a part of the marriage ceremony, and the failure to perform it does not affect the completion or performance of the marriage. Considering the validity of child marriage, Justice Ganga Nath stressed his view in the following words:

The Act aims at and deals with restraint of the performance of the marriage. It has nothing to do with the validity of invalidity of the marriage. The question of validity and invalidity of the marriage is beyond the scope of the *Child Marriage Restraint Act.*[62]

Hence the judges are constrained by the limitations in the Act. Even if the judge feels the omission in the legislation he has no power to fill the gap. The judicial creativism is restricted by the express words used in the statute or by necessary implication. If the omission of the legislature is intentional, the courts have nothing to do with it. The Courts have to delve deep into the words to find out the true purpose and object of the Act at the time of enactment.

In Lajja Devi vs State[63] where the brief facts of the case are as follows that a letter was addressed by Smt. Lajja Devi wife of Sh. Het Ram, to the Hon'ble the Chief Justice of Delhi Court. It was alleged by Smt. Lajja Devi that her daughter named Ms.Meera, who was around 13 years of age was kidnapped by Promod, Vinod, Satish, Manoj S/o Shri Raj Mal. This kidnapping is purported to have taken place when Ms. Meera had visited Delhi to meet the brother-in-law of the Complainant

on the basis of the said information, an FIR filed under Section 363 IPC on 21st February, 2008 against the husband and others This letter was treated as a Writ Petition before the full bench of the Delhi High Court where upon notice was issued to the State directing it to file the Status Report. Four Status Reports have been filed by the Police from time to time. These Reports are dated 02.4.2008, 12.5.2008, 11.5.2008 and 11.7.2008. The local Police, as a consequence of registration of this FIR, had arrested Shri Charan Singh where from the minor girl Ms. Meera was also recovered, as both of them were living together. The girl had made a statement under Section 164 of Cr. P.C. before the learned Metropolitan Magistrate, Rohini Courts Delhi that she had gone along with the accused Charan Singh of her own free will as her Uncle and Aunt were marrying her against her wishes. Charan Singh was taken in Judicial Custody. Meera refused to go along with her parents she was, thus, sent to Nirmal Chhaya in judicial custody. However, when the matter came up for hearing on 31.7.2008, she desired to reside with her parents on the assurance given by the parents that they would not marry her to someone else. She further stated that she was not kidnapped but eloped with the respective person of her own and got married with him. The girl said that the marriage was solemnized with her free consent. However, girl was around 13 years when she got married, whereas there is no dispute about the age of the boy with whom she got married as he was above 21 years of age at the time of marriage. The devision bench was of the view would neither be void nor voidable under Hindu Marriage Act. In this case the division bench High Court has made five questions and referred to the full bench for answering this question.

However, the Court is of the view that a question of public importance is involved in the matter which needs consideration by a Full Bench.

The full bench of Delhi high Court observed that the girl has given statement that she was not kidnapped but, eloped with the respective person of their own and got married with her. The girl also maintained that marriage was solemnized with her free will. The question before the full bench were,

1) Whether a marriage contracted by a boy with a female of less than 18 years and a male of less than 21 year could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)?

2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?

3) If yes, can she be kept in the protective custody of the State?

After considering the provisions and cases cited by both the parties the full bench is of the view that though the legislature has realized the menace of child marriage but has not made adequate legal provisions to make it void. The Delhi High Court has left it to the discretion of the Court to decide the custody of a minor girl in case she enters into a marriage of her own free will. The full bench of Delhi High Court comprising justice A.K. Sikri, Justice Sanjeev, Khanna and V.K. Shali pronounced the judgment on a reference by division bench which has urged the larger bench to decide the status of the marriage Act 1955 and Prohibition of Child Marriage Act 2006 when the girl is minor and whether her husband can be given her custody. Answering the 1st question the full bench said having regard to the legal/statutory position that stand as of now, leave us to answer 1st part of question by concluding that marriage contracted by a female of less than 18 year or a male of less than 21 years would not be void marriage, but a voidable one.

On the question of custody of minor married girl the Delhi High Court full bench said that we are of the opinion that there cannot be straight forward answer to the second part of this question. And depending upon the circumstances the court will have to decide in an appropriate manner as whom the custody of the said girl child is to be given. The question of guardianship does not arise at this stage as she is major and during the period she was minor she resided at Nirmal Chhaya. Thus, the Writ Petition is disposed of in the aforesaid terms. She has attained majority, she is free to go anywhere. Here, the researcher submits that the Delhi High Court has rightly explained the status of the husband and give clear guideline on the question of minor married girl/wife the Delhi High Court observed that in

case of minor married girl/wife there is no strait jacket formula can be applied and further observed that the Court has to be cautious while awarding the custody of minor wife to the husband. The Court shall consider the attendant circumstances including the maturity and understanding of the girl/wife, social background of the girl, age of the girl and boy.

CONCLUSION

After analyzing statuary provisions and judicial attitude regarding the custody of minors married girl. It is also pertinent to note here that parliament should take note on the question of custody minor married girls and make a comprehensive law relating to the minors married girls. It is concluded from abovementioned discussion that the marriage contracted by a person with a female of less than 18 years is violable and the same shall be subsisting until it is annulled by a competent court under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a 'valid marriage' *stricto sensu* as per the classification but it is 'not invalid'. The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage *stricto sensu*, instead he will enjoin only limited rights. The adult male contracting party to a child marriage with a female child shall not be the natural guardian of the female child in view of the implied repealing of Section 6(c) of the Hindu Minority and Guardianship Act, 1956.

The male contracting party of a child marriage shall not be entitled for the custody of the female child whose marriage has been contracted by him even if the female child expresses her desire to go to his custody. However, as an interested person in the welfare of the minor girl, he may apply to the court to set her at liberty if she is illegally detained by anybody. A minor girl whose marriage has been contracted in violation of Section 3 of the Prohibition of Child Marriage Act is not an offender either under Section 9 of the Act or under Section 18 of the Hindu Marriage Act and so she is not a juvenile in conflict with law. The minor girl cannot be allowed to walk away from the legal guardianship of her parents. But, if she expresses her desire not to go with her parents, provided in the opinion

of the court she has capacity to determine, the court cannot compel her to go to the custody of her parents and instead, the court may entrust her in the custody of a fit person subject to her volition. If the minor girl expresses her desire not to go with her parents, provided in the opinion of the court she has capacity to determine, the court may order her to be kept in a children home set up for children in need of care and protection under the provisions of the Juvenile Justice (Care and Protection) Act and at any cost she shall not be kept in a special home or observation home meant for juveniles in conflict with law established under the Juvenile Justice (Care and Protection) Act, 2000.

Before concluding it is submitted that Madras High Court in T-Shive Kumar's case has issued a number of guidelines and directions to the government for sensitized existing laws. The obiter dicta opinion of the Court as follows:

(i) Despite several legislations which have referred to above, the evil menace of child marriages has not been eradicated in *toto*. Though the Central Government evolved 'the National Plan of Action for Children 2005', aiming to eliminate child marriages entirely by the end of the year 2010, the same could not be achieved. Often, in newspapers incidents of such child marriages including young children of less than ten years of age reported. There are also reports that there are widows of age group of less than 10 years. Undoubtedly, child marriage is a violation of human rights and it affects the health of the girls as well as the children born to them. There are reports that minor girls and boys induced by infatuation elope resulting in number of habeas corpus petitions filed by the parents.

(ii) Adequate publicity has not been made to the Prohibition of Child Marriage Act, more particularly, about Section 9[64] of the Act which provides for punishment up to two years and that the offence is also cognizable and non-bail able.

(iii) Police officer (station in charge) should register criminal cases against the offenders and file final reports bringing them to book, the incidents of child marriage can be at least reduced, if not completely eradicated.

(iv) The Government to give adequate publicity for the Act so that it could reach the people and also to sensitize them through Governmental and Non-Governmental Voluntary Organizations.

(v) The police may also be sensitized about their legal obligation to register criminal cases as and when there is information regarding commission of offence of child marriage in violation of the Act.

(vi) The Government should also ensure that the calendars and prospectus issued by Educational Institutions of and above Higher Secondary Courses including Colleges, both professional and non professional, to incorporate the salient features more particularly, the penal provisions of the Prohibition of Child Marriage Act so as to sensitize the students and parents.

(vii) The Government instructs the Educational Institutions to conduct counseling classes for the students in their teens and parents to sensitize them of the ill-effects of child marriages. It is included in BA-LLB integrated course/LLB.3rd years Course in paper relating to clinical legal courses legal literacy and legal Aid programs to sensitize the students. To implement and incorporate the comprehensive guidelines regarding the Prohibition of child's marriage Act.

In the light of above seven points it is suggested that to translate the seven guidelines of the court into action so the child marriage can be at least minimize but, not completely eradicated. Further, it is also suggested that the government should implement the honorable High Court directions through their policies.

(i) The government should implement and incorporate the guidelines relating to the child under international conventions to protect the social /economic rights.

(ii) Sensitization of Prohibition of child marriage Act 2006.

(iii) The compulsory registration of the marriages is an important commitment and government should implement the Seema *vs* Ashwani Kumar's[65] judgment.

(iv) The important thing is that the child should not suffer in terms of social economic status.

Now, the pertinent question is whether the Court intends to give the complete equality to both the parents in matter of the guardianship and custody in which case it would mean either mother/father? In this regard in Geeta Hari Haran case judiciary has given the interpretation of the word "after" would mean the word "after" need not necessarily mean "after the life time". In the context in which it appears in Section 6(a) as, it means "in the absence of", the word "absence" there in referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situation the father can be considered to be absent and mother being recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be natural outcome of a harmonious construction of Section 4 and 6 of Hindu Minority and Guardianship Act 1956, without causing any harm to the language of Section 6(a) of the same Act. However, this judgment of Supreme Court will solve problems of many mothers who are practically in charge of the affairs of their minor children, who face harassment from various authorities, who insists on father signature. But a question will still remains open is , what if the father and mother ,along with the child ,are living together and the father is not "absent" within the meaning of the term as defined by the court. However since the court in the present case, has based only on the interpretation of the word "after "the primary clause under which the mother would be the guardian only "after" the father, still stands. The only change the judgment has made, is that it has given an extended meaning to word "after "to include several situations, it has not given equal rights of guardian ship on the mother .

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15. AIR 1939 All 852.
16. *Ibid,* p.853.
17. AIR 1961 Ori 104

18. Inspite of the marriage being valid, it is transparent from the provisions of the Act that the marriage in contravention of its provisions is a criminal act, punishable under the law, The legislature no doubt disapproves all such marriages and makes the performance of such marriage punishable in law. *Ibid,* p. 105.

19. AIR 1962 Mad, 400

20. *Ibid*, p. 401

21. Section 5 of the Hindu Marriage Act deals with the conditions for a Hindu Marriage and Clause (iii) says that, at the time of the marriage the bridegroom should have completed the age of twenty one years and the bride, the age of eighteen years.

22. According to section 18(a) of the Hindu Marriage Act, 1955, a contravention of the condition specified in clause (iii) of section 5 is punishable with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both.

23. AIR 1961 HP 1.

24. *Ibid.*

25. AIR 1963 HP 15.

26. AIR 1965 H.P. 15.

27. *Ibid*, p. 16.

28. AIR 1969All 623.

29. ILR (1970) cut 1215. It is observed that clause (iii) of section 5, providing for the age of bride and bridegroom is thus specifically excluded from the operation of the provisions of section 11 of the Act. The conditions rendering a Hindu marriage null and void mentioned in section 11 of the Act are exhaustive and it is only on those grounds a court can grant a decree of nullity under the Act.

30. 1970 PLR 102

31. The 59th Report of the Law Commission of India on the Hindu Marriage Act 1955 and the Special Marriage Act 1954 (1974) Government of India.

32. *Ibid.* p.50.

33. AIR 1972 P & H. 184

34. *Ibid* p. 185.

35. AIR 1975 AP 193.

36. *Ibid.* p. 195.

37. Tahir Mohammed "Marriage Age in Hindu Law; A Remarkable Decision from Andhra Pradesh", 1976 (2) Kurukshetra Law Journal - 1 64.

38. AIR 1963 HP 15.

39. Section 16 of the Hindu Marriage Act reads, "Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether *or* not a decree of nullity is granted in respect of the marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act".

40. AIR 1976 MP 83.

41. It is observed that a marriage solemnized in violation of the age rule is neither void *ab initio* or even voidable and they do not find place in section 11 and section 12 of the Hindu Marriage Act. It is only punishable under section 18 of the Act. However, such marriage is valid, enforceable and recognized by law. *Ibid.*

42. AIR, 1977 AP, 43.

43. Marriage Laws (Amendment) Act, 1976 (Act No. 68 of 1976).

44. Section 13(2) if the Hindu Marriage Act, 1955.

45. 1(2000) DMC 431.

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48. 2000 (3) MWN Crl 69.

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53. (CDJ 2011 KAR HC 373)

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55. AIR 2009 SC 557.

56. I (2000) DMC 431.

57. 2000 (3) MWN Crl 69.

58. At this juncture, we may refer to The Tamil Nadu Juvenile Justice [Care and Protection of Children] Rules, 2001 wherein Rule 18 states as follows: 8. Orders that may not be passed (i) No child shall be ordered to be kept in jail or prison. (ii) No child shall be sent back to family against the wishes of the child who shall have an evolving capacity to determine the concept.

59. (2009) 7 SCC 322.

60. AIR 1936 ALL 11.

61. Gauna is a ceremony which marks the departure of the bride to the house of bridegroom. http:llwww.smartsurat.com/hinduism/life-cycle%20rites/vivah.htm (11 -03-2003)

62. Ibid p.12.

63. New Delhi July 29, 2012. WWW.LEGAL INDIA.IN AFTER-20-MINOR-GIRL-CAN-GET-MARRIAGE DECLAREVOID.H.C.

64. Section 9 read as, the punishment for the male, above the age of eighteen, contracting marriage with a minor shall lead to rigorous imprisonment which may extend to two years or with fine which may extend to one lakh or with both.

65. 2006(2) SCC 578.

Chapter-IV

Development of Doctrine of Best Interest Theory/Welfare Theory in England and India

CHAPTER – IV

DEVOLOPMENT OF DOCTRINE OF BEST INTERST THEORY / WELFARE THEORY IN ENGLAND AND INDIA

INTRODUCTION

The researcher in this chapter analyses the law relating to the development and welfare theory in England/India and discuss the legislative provisions and judicial pronouncements relating to the welfare of the minor children. The objective of this chapter is to serve judges and justices who must make decisions and analyze facts and circumstances in light of the law of the best interest standard on matters relating to children. The doctrine affects the placement and disposition of children in divorce, custody, visitation, and adoption, the death of a parent, illegitimacy proceedings, abuse proceedings, neglect proceedings, crime, economics, and all forms of child protective services. And in every case, a judge must decide what is "best" for any child at any time under any particular circumstance. In the modern era, the family courts operate on the unwarranted premise that judges are capable of making fine-tuned judgments about a child's best interests."[1]

Prior to the twentieth century, common law jurisdictions typically treated children as the property of the father, and thus following divorce the father would gain custody as a matter of course. With the development of psychological science over the twentieth century, most jurisdictions completely transformed this presumption of paternal custody, instead imposing the so-called "tender years" doctrine which held that absent extraordinary circumstances young children should always be placed in the custody of their mothers. As it became apparent that both of these models were fundamentally flawed - two sides of the same bad penny - a wide assortment of alternative models arose, each of which attempts to discern the custodial arrangement that is in the "best interests" of the children. Typically, these models include a presumption that the parent who served as the primary caregiver during a marriage should be the primary custodian following divorce.

The "best interests of the child" doctrine is sometimes used in cases where non-parents, such as grandparents, ask a court to order non-parent visitation with a child and in cases where parents, usually those who are not awarded custody, argue that using the 'best interests of the child' doctrine in non-parent visitation cases fails to protect a fit parent's fundamental right to raise their child in the manner they see fit.

PART-I

(A) DEVELOPMENT OF DOCTRINE OF BEST INTEREST THEORY IN ENGLAND

The development of Best Interest Theory has been emerged through various Acts and enactments. The Custody of Infant Act, 1839 give the custody rights to mother of infant child up to the age of 16 years. If the mother is found guilty of adultery, she was excluded from custody rights. The Matrimonial Causes Act of 1857 allowed the court to make decision regarding custody and maintenance. This Act overwrites the right of a father over their children. The powers of court to award custody to mothers increased gradually. In 1886, the Doctrine of Best Interest Theory was introduced.

Section 5 of the Guardianship of Infants Act, 1886 provide that "The court may, upon the application of the mother in any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access there to either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father and may alter, very or to discharge such order on the application of either parent, or after the death of either parent, of any Guardian under this act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just."[2]

In the said section there are four issues concerning the custody of a child:

(i) Mother's right to custody of an infant child

(ii) Right of Access to either parent in welfare of the infant

(iii) Wishes of the parents

(iv) Liabilities of the parents

Whereas, Sex Disqualification (Removal) Act of 1919 have sought to establish equality in law between the sexes and it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred. There by, Section 1 of the Act provides that the court shall decide the questions regarding the custody of infants without regard to concepts regarding father's superior right to custody from the common law stand point and similar power is given under Section 2, to the mother as the father, to move to the court for the custody of the infant. To remove the injustice regarding the custody of minor children, British parliament enacted the Guardian and Infants Act, 1925 and the principle of equality of rights between mother and father with regard to custody of their children considered is paramount.

The status of the mother was improved from time to time under the British law and finally in 1973, the mother and the father were given equal rights and authority in relation to the custody, upbringing and administration of the property of the child Section 1, of the Guardianship Act of 1973, which was enacted to amend the law of England and Wales as to Guardianship of minor so as to make the lights of another equal with those of father, as provides: "In relation to the custody and upbringing of a minor and in relation to the administration of any property belonging to or held in trust of a minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other".

In proceedings involving divorce or the dissolution of a common-law marriage or a civil union, family courts are directed to assess the best interests of any children of these unions. The determination is also used in proceedings which determine legal obligations and entitlements, such as when a child is born outside marriage, when grandparents assert rights with respect to their grandchildren, and

when biological parents assert rights with respect to a child who was given up for adoption. It is the doctrine usually employed in cases regarding the potential emancipation of minors. Courts will use this doctrine when called upon to determine who should make medical decisions for a child where the parents disagree with healthcare providers or other authorities.

In determining the best interests of the child or children in the context of a separation of the parents, the court may determine the living conditions of the child and his custodial and non-custodial parents. Such issues as the stability of the child's life, links with the community, and stability of the home environment provided by each parent may be considered by a court in deciding the child's residency in custody and visitation proceedings. In English law, Section 1(1), Children Act 1989, makes the interests of any child the paramount concern of the court in all proceedings and having indicated in Section1(2), that delay is likely to prejudice the interests of any child, it requires the court to consider the 'welfare checklist', i.e. the court must consider. The ascertainable wishes and feelings of each child is concerned (considered in light of their age and understanding) physical, emotional and/or educational needs now and in the future. The court considers relevant any harm suffered or at risk of suffering now and in the future how capable each parent, and other person in relation to whom the court considers the question to be relevant, is of meeting the child's needs. The range of powers available to the court under the Children Act 1989 in the proceedings is in question. The welfare checklist considers the needs, wishes and feelings of the child and young person. This analysis is vital to ensure that the interest of children is always in the forefront of all consideration. The welfare checklist provides a comprehensive list of issues that need to be considered to ensure that young people who come into court proceedings are safeguarded fully and their rights as citizens are promoted. The Best Interests Standard has received considerable criticism by certain groups within the privacy rights and family law reform movement, particularly with regard to how it unlawfully marginalizes children from one of their parents absent a compelling government interest, and often cultivates protracted litigation. Critics argue that a higher evidentiary standard should be

applied to fit parents, and that the Best Interests standard should only be applied in cases where a termination of parental rights has already occurred.

(B) CHILD CUSTODY IN ENGLAND-JUDICIAL RESPONSE

The birth and development of western child law jurisprudence began in the late 1700s and early 1800s. England's court documents record several cases dealing with matters that brought into question the legal rules regarding children and their worth and value. Among the rules questioned was that of absolute paternal authority, which was taken to task by considering concerns for the child. Lord Mansfield was a pivotal actor clearing this path among the King's Bench. In *Rex vs Devall* in 1763, he ruled that the court was not required to order the children who were subjects of a *habeas writ* to be delivered to their father, but any decision regarding custody was left to the discretion of the judges, "according to the circumstances that shall appear before them."[3] In competing custody claims in *Blisset's Case* in 1774, Mansfield allowed the child to remain with its mother based on the public's concern for the education of the child, thus doing what was best for the child.[4]

Fifteen years later another court of the King's Bench was concerned for a child's best interests. In 1789 in *Powel vs Cleaver*, [5] a case most accurately described as a probate matter, the court reviewed guardianship of a child and his inheritance. An absent father had allowed the testator to care for and support his son until the death of the testator, at which time the father reappeared to claim guardianship of the child along with the child's legacy left to him by the testator. The problem was that such a claim of guardianship by the father would divest the child of that legacy, and the Lord Chancellor "would not suffer the feelings of the parents to have effect against that duty which the interest of the child required." In determining the outcome, the court distinguished this case from the absolute paternal authority of parent over child by considering the competing interests of parent and child and the parent's rights in the context of a child's provision of wealth.

With much discussion of satisfaction of legacy and other probate terms, and further distinctions made in this case from that of parent and child, the court ruled strictly in terms of a finding that would not bring detriment to the child, the provision for his support, or his social status. The Chancellor noted that "he would not allow the colour of parental authority to work the ruin of his child." Thus, it appeared in *Powel* that the best interests of the child heir prevailed over any parental authority. Because *Powel* occurred outside a custody context, it is not generally considered when discussing the foundations of the best interests of the child as a legal standard. It has merit, however, to the foundations of that legal standard nonetheless, as it assisted the decline of the unfettered absolute rights of parents. Furthermore, the perception of children as chattel appeared to weaken as children came to be viewed as something much more and very different by the end of the 1700s.

If *Devall, Blisset's* and *Powel* were sparks for British courts to use a new standard of welfare for children, they were quickly doused in 1804 by blanket judicial reinforcement of the paternal preference, regardless of the child's interests or needs, in the historic case of *De Manneville vs De Manneville.*[6] Despite the fact that it might be best for a nursing infant child of eleven months to remain with his mother, the court had no problem removing the child from the mother's care and giving custody to the father, as a matter of law. "The law is clear, that the custody of a child, of whatever age, belongs to the father, if he chooses."[7] *De Manneville* clarified and emphasized that a British court cannot interfere with a father's right to his child. Any trend set out in *Powel* was negligible in *De Manneville,* and certainly did not pertain to a custody dispute between mother and father. Across the Atlantic Ocean, however, the jurisprudence was forming much differently.

In 1809, a North Carolina father of a five year old girl put his wife of ten years out of their home to bring in his paramour, with whom he lived in open adultery.[8] Though fearful of defying the authority of the common law, the court was incensed by the injustice of the paternal rule as applied to these facts, rationalizing that the responsibility of enforcing the common law was to be passed on to higher courts than itself. That court's opinion did not use language setting

forth the child's best interests as the legal standard for its decision, but the court was clearly disturbed that the father's actions were not those that warranted a court to trust him with custody of his little girl. This was a major departure from the common law paternal preference.

In 1815, a Pennsylvania father sought custody of his two daughters, nine and twelve, in *Commonwealth vs Addicks.*[9] In this case; the court took clear note of its discretion in determining the application of the rules of law at hand. The children's custody had initially been awarded to the mother "when, on account of the tender age of the infants, it was judged improper to take them from the mother." Three years later in the father's plea for custody modification, each parent presented arguments based in the welfare of the child: the father arguing that the children's best interest and their future moral core would best be served by understanding that their mother's morals were corrupt in her adultery; and the adulterous mother arguing that the children's interests would best be served by continuity of their custody with her, as (despite her adultery) she was a good mother. The court was most persuaded by the father's moral arguments that the children needed to understand the sacredness of the marriage vow. Nonetheless, in the face of a change of custody to the father for the girls' "future welfare," the court recommended no "abrupt removal" from their mother "but to conduct the matter so as to avoid a violent shock either to them or their mother."

Addicks appears to be the first use of the best interests of the child as a legal standard. The court had used the most ardent common law rule of paternal preference and pitted it against the developing doctrine of tender years, combining such an analysis with its own discretion, to ultimately determine what would work to the greatest welfare of the children. Used for transferring custody from the mother of children of tender years to their father once they came to be of age to form moral opinions, the court's rationale rests on the importance of children understanding the seriousness of the marriage commitment and how that affects a child's moral base.

In step with the concept of determining what was best for the children, the court made it absolutely clear that part of that which was best for the children was

that the siblings not be separated. Some scholars argue that *Addicks* presents the concept of the best interests of the child as a rationale for the tender year's doctrine, "a view which was theoretically, if not in actual practice, child-focused." Indeed, the tender year's presumption is encased in the best interest's standard, but the latter offers much more discretionary latitude.

English courts, however, continued to hold strictly to the paternal preference rule again in 1824. An imprisoned father living in adultery had taken his six year old child from the child's mother by "stratagem and fraud" in *Ex parte Skinner.*[10] After a discussion of guardianship by *parens patriae* resting in the King's Bench to have jurisdiction to control the right of the father to the possession of his child, the court's ruling relied heavily on *De Manneville* and completely adhered to common law principles of paternal parental rights, concluding that the father had a right to take his child from the mother and the court had no authority to interfere in the case. There was no discussion of how the child's welfare might be affected by the adulterous convict father's rights. Clearly, no trend towards a new legal standard for children was established by *Powel* or any other case in Great Britain's courts. *De Manneville* ruled the day.

Simultaneously, across the Atlantic the hard and fast paternal presumption was challenged in Rhode Island by the new emerging and formidable standard of the welfare of the child in *United States vs Green.*[11] Upon the motion of the father asserting his paternal rights by law, the court saw an obligation to look at all the facts at issue in determining the proper application of that right, and a "wide discussion arose as to the right of the father to have the custody of the infant under the circumstances of the case." Parents' rights to protect children were inalienable, but not absolute when circumstances endangered the child.

The *Green* court declared that the rights of the parent existed for the benefit of the child and were subordinate to the child's welfare when it was endangered. The court proclaimed that its own discretion was the basis for proper application of common law rules. The best interest of the child as a legal standard was gaining momentum by judicial discretion. In 1834, Massachusetts followed suit in *Commonwealth vs Wales Briggs*, when it declared "the good of the child is to be

regarded as the predominant consideration."[12] This effectively proclaimed that any parental right was based on the parents' duty to act in the best interests of the young child. Upon review of the facts and circumstances, the court did not find the father intemperate nor unfit, nor had the mother filed for divorce, which allowed the court to see it in the child's best interests to not interfere with the writ and allowed the rules to work together to govern and regard the good of the child. The *Briggs* court saw the best interest's standard as inherent in the legal rights vested in parents. The best interest of the child as a legal standard was not a new rule, but a purpose for applying the existing rules regarding children.

The same could not be said of England, as the courts there were embroiled in a conflict between applying the common law rules toward near absurdity and a common sense reform of the rules. "Unlike the American courts, King's Bench judges were reluctant to depart from precedent and contravene the father's right to custody even in a very compelling case." In the 1839 case of *Rex vs Greenhill*, a mother took her children from the marital home where the father had moved in his paramour, and the father brought a *habeas corpus* writ to the court to reclaim the custody of his children.[13] "Although it was obvious to the court that the husband was using the children to force the wife to return to the marital residence without having to give up his extramarital liaison, the court saw no alternative to granting custody of the children to their father." England's courts continued to apply the paternal presumption to their own discredit, and most likely to the harm of children and women as well.

Meanwhile, a year later in America, the nascent standard for children was setting deep roots. In 1840, a New York court in *Mercein vs Barry* laid out the conundrum that these conflicting legal rules brewed.[14] The trial court had applied a pure paternal preference finding custody of the baby girl in the father, but upon review that decision was reversed, based upon an apparent application of the tender year's presumption being better for the child. The court was very clear as to the standard it felt it should apply. "The interest of the infant is deemed paramount to the claims of both parents. This is the predominant question which is to be considered by the court or tribunal before whom the infant is brought. The rights

of the parents must in all cases yield to the interests and welfare of the infant." The *Mercein* court viewed the BIC standard as an American development refined out of earlier English law, but also (even unwittingly) began setting children as adversaries against their parents.

Mercein was upheld in the federal circuit court for the Southern District of New York. Reviewed again in the Supreme Court of the United States seven years later, the Court did not recognize that there was no legal reason to grant a writ of *habeas*, nor had they jurisdiction to change the ruling.[15] The High Court took the opportunity, however, to recognize and affirm the duty of the state courts "to make such orders as will be for the benefit of the child"[16]. Distinguishing a child's welfare from a child's liberty interest, the legal standard regarding children was that all parties and their respective rights, particularly parents in their parental rights, were under an obligation to act in the best interests of the child. *Mercein* placed a crowning culmination on early American jurisprudence regarding children. The language in *Mercein* can seem intimidating and broad, granting sweeping authority to a court over a child and his or her family in such a fashion that the case seems to have at once crowned the best interests standard, peaked its credibility, and begun its decline toward the greatest concern over the best interests standard itself—judicial overreach abridging inalienable parent rights.

Addicks, *Green*, *Briggs* and *Mercein* form a foundation of cases that set the framework for the best interests of the child as the legal standard applied to cases regarding children. Before the middle of the 1800s, this new and emerging American family law jurisprudence placed a duty to children upon parents and courts paramount to common law rules which were previously dictated by parental rights alone.

After this series of American decisions regarding children, English courts seriously began to apply rules designed to work for the protection of children. For example, in 1851 rather than purely and legalistically deferring to the paternal preference, even when a father was acquitted of a crime, he was denied custody of his children, based on what the court deemed in the children's best interest.[17] In *Anonymous*, a clergy father of six left his home and was charged and apprehended

"for the commission of an unnatural crime, but no witnesses appearing he was acquitted."[18] The best interests of the children trumped the father's rights to custody, "for the protection of the children themselves."

In *Re Halliday`s estate*[19] in this case, after separation of parents, the child was living with mother. One day the father secretly removed the child from the custody of the mother. On the application of the mother for the custody of the child the court said that if the custody is left with the father and access was given to the mother the mother statuary right could be maintained consistently with the father`s common Law right of custody.

In *Re Curtis*[20] in this case vice chancellor kindershy said that the court of chancery could not decide upon the custody of infants simply with reference to what is for their benefit and could not interfere with the right of the father, unless he is so conducted himself as to render it essential to the safety and welfare of the children in some serious and important respect either physically intellectually or morally that they should be removed from his custody.

In *Re Goldsmith*[21] case the court was compelled to deny custody to the father because of gross misconduct of the father. It was found that the father habitually indulged in inebriety and violence of the language of a most abominable character that could be conceived of. Seven years after the court got an opportunity In *Re Agarallis*[22] to reiterate the doctrine of scared parental rights. Bowen, L.J said that to neglect the natural jurisdiction of the father over children until the age of 21 would really be to set aside the whole course an order of the nature'. Only when it becomes that the right of the family are abused to the detriment of the children, the father no longer remains a natural guardian he becomes an un natural guardian, but until that happens mere disagreement with the views taken by the father of his right an interest of his children could not justify court`s interference. If it were not so, the learned Judge held, that the court might be interfering all day and with every family. The same principle also reiterated in Re Elderson (infants)[23], where Cotton, L.J, observed that the court has jurisdiction to interfere with the father`s right only in exceptional circumstances such as immorality or cruelty of the father. This was an exceptional case where it was found that the children were weak

delicate and of nervous temperament requiring excessive care and were not fit to be sent to school. Under these circumstances the court felt compelled to give custody to the mother.

In *R Vs Gyngall*[24] the court took the views that the rules prevailed at equity could also be applied in the Habeas Corpus proceedings. Justice Esher, M.R that "the court must exercise the jurisdiction with great care, and can only act when it is shown that either the control of the parent or the description of person he is, or the position in which he is placed is such as to render not merely better but, -I will not say essential -clearly right for the welfare of the child in some very important respect that the parents right should be superseded". Thus we have observed that till the 18th century the court still hesitated to follow the principles of the welfare of the children is the paramount consideration.

In *Re O' Hara*[25] case the Irish Court summarized the position regarding the welfare of the child that "prior to the Judicature Act a parent was held at common law to have, as against stranger, an absolute right to the custody of his child of tender years unless he had forfeited it by misconduct. But, the court of chancery from time immoral, has exercised another and distinguishable jurisdiction i.e.: a jurisdiction resting on parental authority of the crown by virtue of which it can supersede the natural guardianship of a parent and can place a child in such custody as seems most calculated to promote its welfare". His lordship said that the period during which the child has been in the custody of the stranger is always an important element in considering what is best for a care of child welfare. For instance, if a boy has been brought from its infancy by a person who has won his love and confidence who is training him to earn his livelihood and separation from whom would breakup all the association of his life, no court ought to sanction in his case a change of custody. The learn judge said "The welfare of the child" means welfare in its widest sense. In *Ward vs. Laverty*[26] viscount Cave said that the rule that a child is to be brought up in the religion in which his father desires him to be brought up is subject to the welfare of the child.

In *W Vs. W*[27] the wife obtained a decree for restitution of conjugal right, and on the husband's failure to comply with it, applied for custody of the child age 5 years.

The child was living with paternal grand-parent`s with whom parents were living earlier. On the wife`s plea that delinquent party was not entailed to custody, the court observed that "the matters of immediate consideration are the comfort, health, moral, intellectual and spiritual benefit of the child". The court held that the child should remain where it was. Access was granted to the mother.

In *Re Caroll*[28] case the one Caroll, a Roman Catholic by faith had a two years old illegitimate child. She applied to a protestant society to help her in making arrangement for the adoption of the child. The society was able to find out some respectable person who was will to take the child in adoption consequently; the child with the concern of the mother was placed in the custody of that person. The mother changed her mind and wanted to child back. In the background was a Roman Catholic society which was willing to keep the child in its home for children. Lord Heward, C.J. in the king`s bench division said that there seems to have been between these few years, 1891-1925, a certain development of thought in the matter of custody of children viz it is not the wish of the parent which is paramount consideration but, the welfare of the child.

In *Re B`s settlement*[29] the chancery division said that what might have been the position before 1925, under section1 of the Guardianship of Infants Act, 1925, the court was bound to consider the welfare of the child as the first and paramount consideration. Chancery Division was concerned with an application for custody by the father of an infant who had been made a ward of court. The father was a Belgian national and the mother a British national who took Belgian nationality on marriage to him. The infant was born in Belgium. The mother was granted a divorce by a judgment of the Court in Belgium, but the judgment was reversed and the father became entitled to custody by the common law of Belgium. The mother, who had gone to live in England, visited Belgium and was by arrangement given the custody of the infant for some days. She took him to England and did not return him. The infant had been living with mother in England for nearly two years. The father began divorce proceedings in Belgium, and the Court appointed him guardian. Pending the proceedings, the Court gave him the custody and

ordered the mother to return the infant within twenty-four hours of service of the order on her. She did not return the infant. The Correctional Court in Brussels fined her for disobedience and sentenced her to imprisonment should the fine be not paid. The Correctional Court also confirmed the custody order. In the backdrop of these facts, the summons taken out by the father that custody of the infant be given to him came up before Morton, J. who after hearing the parties and in view of the provisions of the Guardianship of Infants Act, 1925 observed that "At the moment my feeling is very strong that, even assuming in the father's favors that there is nothing in his character or habits which would render him unfitted to have the custody of the child, the welfare of the child requires, in all the circumstances as they exist, that he should remain in England for the time being in the present case the position is that nearly two years ago, when the child was already in England, an interlocutory order was made by the Divorce Court in Belgium giving the custody of the child to the father I do not know how far, if at all, the matter was considered on the footing of what was best for the child at that time, or whether it was regarded as a matter of course that the father, being the guardian by the common law of Belgium and the applicant in the divorce proceedings and the only parent in Belgium, should be given the custody. I cannot regard that order as rendering it in any way improper or contrary to the comity of nations if I now consider, when the boy has been in this country for nearly two years, what is in the best interests of the boy. I do not think it would be right for the Court, exercising its jurisdiction over a ward that is in this country, although he is a Belgian national, blindly to follow the order made in Belgium on October 5, 1937". The judge further observed that "I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country".

In *Allen vs. Allen*[30] case Wrottesley and Evershed, L.JJ. Expressly differ from the view taken by the trail judge that the mother who had committed adultery is not

entitled to the custody of her children. The judges observed that "the welfare of the child , both moral and physical, was the paramount consideration it was impossible to say, because a women once committed adultery she was not a fit person, *vis a vis* who has not look after a child. There was no suggestion that the mother was promiscuous, or bad mother or a bad house keeper, or anything which made it undesirable for her to look after a child. In *Re Collins*[31] after the death of his parent a child was living with his maternal grandparents who were protestant. Paternal grandparents who were Catholic applied for custody. The father of the child was a Roman Catholic and the mother was a protestant. The child was baptized as Roman Catholic. Evershed, M.R, said that historically a father was treated as having absolute rights, which the Law was bound to recognize an enforced unless he had forfeited his rights by his misconduct. In *Wakeham vs. Wakeham*[32] the father after obtaining the decree nisi in divorce proceedings asked for the custody of the child who was with the mother in South Africa the court granted custody to the father though left opened the question of care and control as a child was outside the jurisdiction. Sir Reymond said that welfare of children was of paramount consideration. In *J vs. C*[33] a boy was born in England of Spanish parents in 1958. On account of mother illness he was taken care of from the age of four days by the English foster parent in their home in 1960 when parent returned to Spain they took the child with them but, there his health suffered and therefore he was returned to England to stay with his foster parents indefinitely. There were some legal proceeding between the foster parent and the natural parents of the child in respect of its custody which did not make much headway. In 1967 some other proceedings were instituted and the parents claimed custody. By this time the child was ten years old. His parents lived suitably and in no way were unfit person to have custody. At the same time the home of Foster parent was a good home and it was a happy united family with which an infant had become well integrated. There was expert evidence that the chances of child making successful adjustment in Spain were slight and that if he did not consequences for his future emotional stability and happiness were grave. The trial judge in the welfare of the child, refused to grant care and control to the parent. The view was upheld by the House

of Lords. The House of Lords unanimously rejected the contention on behalf of the parent that united parent that are *prima facie* entitled to custody of their infant children and that the court of chancery as representing the queen as *parens patrie* will only deprived them of the care and control of their infant children if they are unfitted character, conduct or position in life to have this control. Thus, it is observed that with decision of the House of Lords, the English law of guardianship has taken a full turn. The guardianship of infants Act now apply to proceedings between parents, legal as well as natural, between parents and stranger and between strangers. The implication is that the welfare of the children is the paramount consideration in all proceedings in respect to children, irrespective of the fact whether the question is agitated by a parent or a Stanger.

In *Re F*[34] case the father of a child was convicted of manslaughter of mother after the death of the mother the child was entrusted in the custody of a young couple. After father's conviction the couple stared the adoption proceedings. The father was opposing to adoption. The court said that the father refusal to adoption could not in any event outweigh the consideration which made it imperative for the child to be removed from the influence of the father and his family. Disregarding the wishes of father the court passed the adoption order. Thus, it is submitted that the welfare of the child is paramount consideration although parental rights also given some weighs by the Courts.

In *Re. L (minors)*[35] the Court of Appeal was concerned with the custody of the foreign children who were removed from foreign jurisdiction by one parent. That was a case where a German national domiciled and resident in Germany married an English woman. Their matrimonial home was Germany and the two children were born out of the wedlock and brought up in Germany. The lady became unhappy in her married life and in August, 1972, she brought her children to England with an intention of permanently establishing herself and the children in England. She obtained residential employment in the school in England and the children were accommodated at the school. The children not having returned to Germany, the father came to England to find them. On October 25, 1972, the

mother issued an originating summons making them wards of court. The trial judge found that the children should be brought up by their mother and treating the case as a `kidnapping' class of case, approached the matter by observing that in such a case where the children were foreign children, who had moved in a foreign home, their life should continue in what were their natural surroundings, unless it appeared to the court that it would be harmful to the children if they were returned. He concluded that in view of the arrangements which their father could make for them, the children would not be harmed by being returned. He, accordingly, ordered that they be returned to Germany and that they remain in their father's custody until further order. The mother appealed, contending that in every case the welfare of the child was the first and paramount consideration and that the welfare of the children would be best served by staying with their mother in England. Buckley, LJ in his detailed consideration of the matter, wherein he referred to the aforenoticed decisions and few other decisions as well, held as follows:

Where the court has embarked on a full-scale investigation of those facts, the applicable principles, in my view, do not differ from those which apply to any other warship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, any may be a circumstance of great weight; the weight to be attributed to it must depend on the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the `kidnapper' the child should remain in his or her care or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed. Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment apply, but the decision must be justified on somewhat different grounds. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what

complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.

In *Re. L. (minors*[36]*)* the Court of Appeal has made a distinction between cases, where the court considers the facts and fully investigates the merits of a dispute, in a warship matter in which the welfare of the child concerned is not the only consideration but is the first and paramount consideration, and cases where the court do not embark on a full-scale investigation of the facts and make a summary order for the return of a child to a foreign country without investigating the merits. In this regard, Buckley, L.J. noticed what was indicated by the Privy Council in *McKee v. McKee*[37] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child.

In *Re*[38] it was held by the Court of Appeal in *L (minors)* that whether the court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or

the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the unauthorized removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. It has been held that the concept of forum convenience has no place in ward ship jurisdiction.

A determination of what's best for any particular child requires a case-by-case examination of both the needs of the child and the advantages presented by those seeking custody. Most custody disputes involve a mother and father at the time of or after a divorce. Others involve a third party, usually a relative, seeking custody at the time of the death or incapacity of a parent. Occasionally, a custody dispute arises when the parents have never been married. The courts start with a presumption that parents are in the best position to look out for the welfare of their own child. This presumption can be overcome by establishing that a parent is not fit or able to best care for the child. In making these determinations, the courts look to various factors, established by state statute or case law.

In contact cases the court always has the duty to apply Section I of the Children Act that the welfare of the child is paramount, and in considering that welfare, to take into account all the relevant circumstances, including the advice of the medical experts as far as it is relevant and proportionate to the decision in that case. It will also be relevant in due course to take into account the impact of Article 8 of the Convention on Human Rights on a decision to refuse direct contact. It has equally been intended to be for the benefit of the child rather than of the parent. Over the last forty years there has been movement away from rights towards responsibilities of the parents and best interest of the child.

In *Re: O (contact Imposition of conditions)*[39] mother refused the father contact to his child aged 2 year. Sir Thomas Bingham said "first of all, and over riding all else as provided in Section 1 (I) of the 1989 Act, the welfare of the child is the paramount consideration of any court concerned to make an order relating to the up bringing of a child. It cannot be emphasized too strongly that the court is concerned with the interests of the mother and the father only in so far as they bear on the welfare of the child. Secondly where parents of child are separated and the child in the day to day care of one of them, it is almost always in the interest of the child that he or she should have contact with other parents. The reason for this scarcely needs spelling out. It is, of course, that the separation of parents involves a loss to the child, and it is desirable that loss should so far as possible be made good by contact with the non custodial parent, that is the parent in whose day to day care the child is not.

In *Re: H and Ors (Minors)*[40] case the father and mother both are orthodox Jews. The mother belongs to England and the father belongs to Israel. The couple spent much of time in Israel. Two children were born in England and third child born in Israel unfortunately the marriage was not successful the mother was not happy to live in Israel. She had removed the children without the consent of their father and lived with children in England. Father wanted that his children live with him in Israel and should grow up in his religious environment. There are the religious courts, (Beth Din) made an order authorizing the father to take whatever steps he saw fit. The father then immediately invoked the convention procedure

(convention on the civil aspects of international child abduction 1980) and Child Abduction and Custody Act 1985. "The object of the convention is to protect child from the harmful effects of their wrong full removal from the country of their habitual residence to another country and their wrongful retention in same country other than that of their habitual residence". By Article 3 of the convention child's best interest can be achieved to return the child to his habitual state the lower court granted custody to the father. But the appellate court reversed the earlier decision and held that "custody of child remains with the mother and that recourse of International Convention is being adopted a step ancillary to and not in substitution. Religious interest is not the sole consideration. The child's welfare must be considered by the court".

In *Re: L (A Child)*[41] case the child T is a little girl born on the 29th June 1998 and is still under two years old. She lives with her mother. The father applied for a parental responsibility order and contact to the child. The applications came before this honor judge Allweis on the 29th September 1999. He heard evidences of violence alleged by the mother both before and during the latter part of her pregnancy which included slapping, hitting her with an umbrella and trying to strangle her which caused bruising to her neck. The father completely denied the violence at the contact hearing and on appeal. The court found the mothers account of violence to be true. The court held "that direct contact if ordered, would trigger enormous anxiety which would affect the mother. The mother's attitude towards contact would put T at serious risk of major emotional harm if she were to be compelled to accept a degree of contact to be father against her will, and indeed in time that heightened anxiety would be conveyed to the child. The court made a residence order to the mother and order indirect contact and dismissed the father's application for a parental responsibility order".

In *Re: V (A Child)*[42] case where the child J was 9 years old boy born on the 2nd November, 1990. He lived with his mother the parents were married in South Africa in 1988 and moved to England in 1991. They finally separated in April 1994. Contact ceased in December 1994 after J witnessed a serious incident when the father attacked the mother in the kitchen with a knife and caused an injury to

her finger which bled profusely. The father was tried and pleaded guilty to causing grievous bodily harm, and was sentenced nine months imprisonment. After his release in June 1995 the father sought contact with the child which was refused. He applied for contact order in 1996. The court granted to indirect contact which is the subject of this appeal. Permission to appeal is granted. The court held "that the father is to be commended for his great efforts to improve his conduct but contact cannot be seen as a reward for that endeavor. Contact has to be in the best interest of his son. Therefore, the appeal was dismissed". In *Re: M (A child)* case where the child G is a boy born on the 24th January 1991 and is now 9 years old. He lives with his mother. The parents married in March 1987. The marriage was not happy the mother obtained an in junction against the father based upon his violence towards her. The child was born after they separated and initially the father denied paternity but it was established in March 1992 when the child was 18 months he saw his father on a regular fort nightly basis in a contact centre in the presence of his mother. This contact continued over 5 years. No effort was made to move the contact on from supervision by the mother in the contact centre. The contact came to an end after an argument between the parents in front of G who subsequently said that he did not want to see his father. The court refused on order for direct contact and ordered indirect contact by letters, cards and Christmas and Birthday presents. The court refused permission to appeal.

In *Re: D (a child abduction: Rights of Custody)*[43] case the parents had married in Romania. The child was born in Romania after two years their marriage was broken. The mother had taken the child to England without the consent of his father. The father initiated proceedings under the Hague Convention and Child Abduction and Custody Act 1985 which gave the domestic effect to the Hague Convention on the Civil Aspects of International Child Abduction 1980, under Article-3. The main issues were, firstly whether the removal of the child from Romania to England was within the meaning of Article-3 of the convention, secondly whether the father had the rights of custody or only rights of access within the meaning of Article-5 of the Hague Convention on the Civil Aspects of International Child Abduction 1980, whether the mother has breached the rights of

custody, thirdly whether the child should return to Romania and fourthly the Romania court held that the father's right did not amount to rights of custody for the purpose of Article-3. On appeal the Romania appeal convention held that, the father's right did not amount to rights of custody for the purpose of Article 3. Accordingly it was concluded that the removal of the child by the mother in December, 2002 had not been wrongful. However the High Court allowed further evidence to be added as to Romania law. The judge then ordered the child's return to Romania upon certain understandings by the father. The mother's appeal to the court of appeal was unsuccessful and she appealed to the House of Lords.

The House of Lords held that where the custody of the child had been obtained by fraud or in breach of the rules of natural justice, a determination under Article-15 of the convention was conclusive as to the parties' rights under the law of requesting state. In the instant case the Romania Appeal Court had held unequivocally that the parent to whom custody was not awarded only acquired the right to visit the child and hatch over his upbringing, education and professional training, none of which rights granted with the power to withheld any decisions concerning he was not entitled to decide upon his dwelling place or upon changing it. It accordingly upheld the decision of the lower court the removal of the child had not been illegal and father had not had rights of custody. It had been wrong for the English court to have permitted further evidence which had challenged not only the conclusion but the statement of the content of the father's rights set out in the judgment of the Romania Court. Accordingly the father had no rights of custody for the purpose of the conventions when the child had been removed to the United Kingdom in December 2002. The removal had not been wrongful and no obligations to return the child arose under the convention, the appeal therefore is allowed.

In *Re: M and another (children abduction)*[44] case the two children were born in Zimbabwe to Zimbabwean parents. In 2001, their parents separated, and they lived with their father in Zimbabwe. In 2005, their mother wrongfully removed the children to U.K., cleaning a system thereby. The children lived in U.K. thereafter. Two years after their shifting in U.K., the father applied for their

return to Zimbabwe under the Hague Convention on the Civil Aspects of International Child Abduction 1980, given effect in domestic law by the Child Abduction and Custody Act, 1985. But the children objected to being removed to Zimbabwe. The judge found that neither the children nor their mother had any lawful right to remain in U.K. The court of appeal upheld that decision. The mother appealed in the House of Lords. The following issues arose in this case, are firstly whether, once the children were settled, there was discretion nevertheless to return them under the convention, or whether their return had to be sought and ordered under some jurisdiction. Secondly if there was such discretion, the principles on which it should be exercised and how far, if at all, they differed from the principles which would apply to the court's power to return them under some other jurisdiction.

The basic obligation to return the child is spelled out in Article 12 as under:

"Where a child has been wrongfully removed or retained in terms of Article 3 and at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The Judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

It was held by the court that. "On its true construction, Article-12 of the Hague convention envisaged that a settled child might be returned within the convention procedures. The words 'shall unless left the matter open. That construction would be consistent with all the other exceptions of the rule of return. When a court came to exercise its discretion, it was entitled to take into account the various aspects of the convention policy, alongside the circumstances which gave the court a discretion in the first place and wider considerations of the child's rights and welfare" in the second place. Furthermore, where a child's objection was raised, only two conditions needed to be met for such an exception to be brought into play. First, that the child herself objected to being returned and

second, that she/he had attained an age and degree of maturity at which it was appropriate to take account at his/her views. The mother appealed against the decision of the court of appeal, which was dismissed on the application of the father, that their two children should be returned to Zimbabwe, where the father was resident and from where the mother had removed them.

In England, Habeas corpus has also long been used to gain the custody of infants. The writ is issued on the application of the party seeking custody and is directed against whoever has the control of the infant. Though, in theory, it still rests on the idea of relieving an illegal restrain, the ordinary rules of family law apply in custody cases and the matter is heard in the family division. An Application for custody is a proceeding which involves "not a question of liberty, but of nature, control and education". The Court has an extensive and special jurisdiction over wards of courts in respect of both their person and their property and exercising their jurisdiction it acts in a parental and administrative manner. Therefore, the court will decide who is to have the custody, care and control of the ward and who is to have access is to be allowed. It will control where the ward is to live and will not permit him to be removed from the jurisdiction of the court without leave. It follows that it can make orders for his maintenance and supervision his education and religious upbringing and investigates proposal as to marriage. In the exercise of this jurisdiction also, the welfare of the minor is the paramount consideration.

In the case of *T vs. S (Wardship)*[45] the parents, who were separated, had become deeply conflicted over contact arrangements and the child had been made a ward of the court. Although there had been substantial compliance with court orders throughout proceedings and by this stage the father was having staying contact. the mother continued to make unsubstantiated allegations and the father showed no insight into the problems caused by his behaviour. The child had a potentially serious physical condition, the resultant medical advice being to circumcise the child. The court made a detailed order in wardship for the child to live with the mother whilst spending significantly increased time with the father alongside a family assistance order. The judge reserved all applications for the next 16 months

to himself to be listed ex parte in order to establish whether judicial enquiry was merited. The case is useful in that it was made clear that wardship remains permissible where the needs of the child required it within a private law context. In these specific circumstances wardship was deemed appropriate to continue as the exercise of parental responsibility had been effectively abrogated by incessant parental conflict, a residence order had assumed totemic status in the parents' minds and would be unhelpful to the child's future care, and there was an unusual need for the court to exercise control through detailed provisions. In emergency situations due to the immediate effect of wardship, the jurisdiction remains particularly useful in emergency situations such as where medical treatment is required, forced marriage is anticipated, or there has been threatened child abduction. The child becomes a ward of the court immediately upon the originating summons being issued thereby providing immediate protection. Furthermore an application to the High Court may also be taken more seriously and have greater weight. Of course, when the matter is brought before the court for consideration it may well be that the court is not satisfied, upon consideration, that wardship is the appropriate recourse. However, at least the position will have been frozen up to that point. Due to the immediate nature of wardship it remains particularly effective in threatened child abduction cases. A child who is a ward of court may not be removed from England and Wales without the court's permission and where such permission has not been given, police assistance to prevent removal may be obtained. Such proceedings are, however, limited to children who are habitually resident in the UK and thus are subject to the jurisdiction.

Similarly in *ZA and PA vs. NA (Abduction: Habitual Residence)*[46] both parents were from Pakistan but had settled in the UK with their three children. The father became physically abusive to the mother who sought refuge before reconciling with the father on a holiday to Pakistan. During this trip the father seized the family's passports. Upon a fourth child being born in Pakistan, the mother visited her father and recovered her passport before flying back to the UK. There she secured an ex parte return of all four children under wardship proceedings

following a declaration that they were habitually resident here. The court allowed the father's appeal in relation to the youngest child only as that child had never set foot in the UK. If nothing else, this case is illustrative of how wardship can be used at least initially to secure the desired result pending a hearing. In such cases one needs to act quickly; if unsure about jurisdiction, originating summons may still be issued to make the child a ward of the court immediately and the issue can then be explored with the child protected.

PART-II

(A) DEVELOPMENT OF DOCTRINE OF BEST INTEREST THEORY IN INDIA

In India the Doctrine of Best Interest Theory developed through the legislation. All the personal law relating to matrimonial statutes make provisions for dealing with the issue of child custody.[47] the provisions in the matrimonial Acts can however be invoked only when there are some proceedings under the Act. Hindus have an additional Act viz. the Hindu Minority and Guardianship Act, (HMG) 1956. A part from this there is the Guardian and Wards Act, 1890 (GWA). This is a secular law for appointment and declaration of guardian and allied matters, irrespective of caste, community or religion; through in certain matters the court will give consideration to the personal law of the parties. The provisions of the Hindu Minority and Guardianship Act, 1956 and (other personal laws) and Guardian and Ward Act, 1890 are complementary and not interrogation to each other and courts are obliged to read them together in a harmonious way. These acts include the word welfare, the word welfare has to be taken in the widest sense and must include the child's moral as well as physical well being and also have regard to the ties of affection. A part from the above mentioned Acts, the important Sections relating to the custody and welfare of the child's Section 4, 6, 13 of the Hindu Minority and Guardianship Act, 1956 and Section 4(2), 7, 12, 17(3) (5), 19, 25 of the Guardian and Wards Act 1890 and Article 32 and 226 of the constitution is also related to the child's custody. Inspite of above provisions relating to the welfare of the minor, for the Muslim minors "the law applicable" would mean the

Muslim Law of Guardianship which has to be the rule of decision as provided in the Muslim Personal Law (Shariat) Application Act 1937- Section 2.

Under Section 4 of Hindu Minority and Guardianship Act 1956, a Guardian means a person having the care of the person of a minor or of his property or both his person or his property and includes a natural guardian, a guardian appointed by the will of the minors father or mother a guardian appointed or declared by Court Natural Guardian means any of the Guardian mentioned in Section 6 of HMG Act 1956. Section 6 of the Act of 1956 contemplates that in a case of a boy it is father and after him the mother who is natural guardian provided the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. Section 13, of the 1956 Act lays down that welfare of the minor is of paramount importance and provided that:

- While appointing or declaring a guardian for a minor, the court shall take into account the welfare of the minor;
- No person shall have the right to guardianship by virtue of the provisions of this Act or any law relating to the guardianship in marriage if the court believes that it is not in the interest of the minor.

The word welfare has the widest amplification. It is to be understood so as to cover the material and physical well being, education, health, happiness and moral welfare of the child.[48] What constitutes the welfare of the minor has to be determined by the court after a careful consideration of the facts and circumstances of the case, as the Act does not lay down any test or guidelines to determine what is for the welfare of the minor. The court has taken into account all relevant facts on record and to decide whether father or mother should be appointed as guardian of the minor. While arriving at this conclusion, the welfare of the minor alone will be supreme consideration. It is not necessary for the court to appoint father alone as a guardian in preference to mother under Section 6. That Section is further controlled by Section 13(2) which gives ample power and jurisdiction to the court not to appoint a person as a guardian, if it is the opinion of the court that such appointment was not in the interest of the minor. By virtue of Section 2 of the courts are obliged to read together and harmonies the provisions of Section 19 of

Guardian and Wards Act, 1890 and Section 13 of the Hindu Minority and Guardianship Act 1956 construing them together, the rigour of the prohibition constrained in clause (b) of Section 19 of the Guardian and Wards Act 1890 must be considered to have been relaxed to great extent in the interest of minors welfare as laid down in Section 13 of Hindu Minority and Guardianship Act, 1956. If the circumstances so warrants the father under Section 25 of Guardian and Wards Act can be disallowed in the better interest of minor's welfare.

(B) EFFECT OF SECTIONS 6 AND 13 OF HINDU MINORITY AND GUARDIANSHIP ACT OF 1956 AND SECTIONS 17 AND 19 OF GUARDIAN AND WARDS ACT OF 1890

The effect of Sections 6 and 13 seems to realize that if they are read together then it will be seen that neither the father nor the mother can, as of right, claim to be appointed by the court as the guardian of a Hindu minor, unless such appointment is for the welfare of the minor. The welfare of the minor is of the paramount consideration, so in regard to being granted the custody of a minor by the court, the mother cannot, as of right claim it merely because a minor is below the age of five years, nor can the father get the custody as of right solely on the ground that the minor has completed the age of five years. That simply from the fact that Section 6 provides only that the custody of a minor, who has not completed the age of five years shall ordinarily be with the mother and Section 13, which relaxes the rigour of Section 19 of the Act of 1890 in the interest of minors welfare also means the welfare of the minor the paramount consideration. The approach adopted by the Act of 1956 is thus some what different from that adopted by the Act of 1890 which is tilted to some extent in favour of the father.[49] Thus it is realized that these sections also made for child's welfare.

The law relating to child welfare is also discussed under the Guardian and Wards Act, 1890. Under Guardianship and Wards Act Section 4 clause (2) the term 'Guardian' has been defined "Guardian means a person having the care of the person of a minor or his property or of both his person and his property".

Section 7 of the Act 1890 contemplates that where the welfare of a minor should be made appointing a guardian of his person to be such a guardian the court

may make an order accordingly. It also provides that an order in this Section shall imply the removal of any Guardian who has not been appointed by will or other instrument or appointed or declared by the court Section 12 of the Act 1890 contemplates the court may direct that the person, if any having the custody of the minor, shall produce him or cause him to produce at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it think proper.

Section 17 of the Act of 1890 envisage that in appointment or declaration of the guardian of the minor the court shall be guided by what appears in the circumstances to be for the welfare of the minor and for considering what will be for the welfare of the minor the court shall have regard to the age, sex, not religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any of a deceased parents, and any existing or previous relations of the proposed guardian with the minor or his property.

Section 17 clause (3) of Guardian and Ward Act 1890 provides that if the minor is old enough to form an intelligent preference, the court may consider that preference. Section 17 clause (5) of the Act contemplates that the court shall not appoint or declare any person to be a guardian against his will.

Section 19 of the Guardian and Ward Act 1890 provides that the court can not declare or appoint any person as Guardian of the person of a minor whose father is living and is not in the opinion of the court, unfit to be the Guardian of the person of the minor. The combined effect of Section 17 and 19 of Guardian and Ward Act 1890 consistent with the law to which the minor is subject (Section 17) the welfare of the minor should be taken into account in appointing a Guardian (Section 17). However, according to the language of the Section 19(a), 19(b) the preferential right of the husband or father can not be ignored unless, the opinion of the court, the husband or father is unfit to be the guardian. It should be noted that courts have taken a liberal view in the matter. For example, the Supreme Court in case *Mohini vs Virendra Kumar*[50] – Keeping in view the welfare of a male child of eleven years declared the mother as his guardian. In this case there was nothing against the father to disentitle him to be a guardian, but the Apex Court felt that

child's welfare is financially and affectionately safe in the hands of the mother. Therefore the text of the law should be amended by ensuring that the consideration of the welfare of the minor shall be paramount and eliminating the possibility of any argument being taken to the effect that father must be appointed if he is not unfit.

Section 25 lays down that only a Guardian can apply for custody. The latter part of the Section lays down that in determining the question of custody the court would be guided by the welfare of the minor child. The plain meaning of Section 19 is that the court finds the father unfit for guardianship; it can not appoint any other person as guardian. The combined effect of Section 19 and Section 25 is that guardianship and custody can not be separated only guardian can apply for custody. In this perspective the question of welfare is going to the background.

Section 25 of the Guardian and Wards Act on the following grounds also discussed the principle of Best Interest Theory / or Welfare Theory.

(i) The first and paramount consideration is the welfare of the minor and all other considerations are subordinate to the welfare of the child;

(ii) Under Hindu Law the primary responsibility is that of the father and he is the natural Guardian of minor and ordinarily his right to the Guardianship and custody of the minor should not be taken away unless he is proved to be unfit;

(iii) It is now being said that in modern times there is no substitutes for the mother's love and warmth of affection towards children and, therefore, in appropriate cases on a consideration of tender age of a minor and other circumstances, such as a second marriage by father the father's right may be allowed to be defeated and subordinated to the interest of the minor and the custody of the mother may be preferred to that of the father, provided the mother is not disqualified an account of unchastely or other vicious habits;

(iv) The proper principle with respect to the age is that if the minor is of tender years, the custody of mother should be preferred, if the minor especially a male has acquired an age of acquiring education and preparation for labour and business, then the father's custody should be considered as more suitable;

(v) On a consideration of sex, a female child should ordinarily be allowed to remain with the mother than with the father;

(vi) The custody in which the minor had been prior to the controversy should not ordinarily be disturbed, if there are materials to show that the minor has reconciled to that custody and really disliked the change;

(vii) The wishes of the minor are also important, if a minor is of age to use his intelligence or his wishes should be respected;

(viii) Here is a heavy burden upon the court to decide very carefully an anxiously various considerations and decide each application on the facts and circumstances of that case, so as to promote the welfare of the minor and select a guardian best fitted to assure the welfare of the minor and there after guide and control the guardian of the minor;

(ix) The commission on the part of the father to prove the bad character of his wife cannot be considered a conclusive fact making the father fit to be the guardian of the minor son. Similarly the finding that the wife was turned out of the house does not deserve to be given weightage so as to consider the father of the child an unfit person. The manner in which the mother of the child was turned out of the house is no doubt a fact to be considered, but it has to be considered along with other circumstances and not individually.

Section 25 of the Guardian and Wards Act, 1890 can only be invoked where the minor leaves or is removed from "the custody". This word has given room to much controversy and conflicting decisions. While discussing the Section 25 the definition of "custody" as given in the Children and Young Persons Act of 1933 of England was extracted. According to that Act any guardian legally liable to maintain a minor is presumed to have custody of the minor. This position is further clarified. A father is said to be as yet has custody of the child though he is not living with either the child or mother of child. This latter presumption is made as between father and mother. The distinction between actual custody and constructive custody is brought about. Thus, a Guardian who may have constructive custody may not have actual custody. It is by now seen that the father is definitely set down in Muslim Law as liable to maintain the child as its natural

guardian. Muslim law puts the child into the hands of the mother or grandmother at a time when the father is made liable for maintenance of the minor. It ultimately delivers the child to the father. Under such circumstances actual custody of the child could be with some one other than the father. English law would presume the father as a natural guardian to have the custody of the child. It would have said that the child who was in actual custody of the mother was in charge of the mother in the custody of the father. The same Section of the Act said that any person to whose charge a child or young person is committed by any person who has the custody of him shall be presumed to have charge of the child or young person.[51] Thus Muslim guardian father would be the custodian having constructive custody and a lady is said to be entitled to the custody of the minor under that law would be in the charge of the minor. A mother who is the custodian of her child under the Mohammadan Law may leave the child in the hands of governess. Yet she would deem to be in custody of the child. The physical possession with some one else does not disentitle from her custody the person in actual physical possession is said to be in terms of the English Act, is care of the child with these distinctions a child can be said to be in care of the person in whose actual physical possession of the child from the person in whose care the child is and the custody of the person who is to maintain it. As in the other Sections even in this an emphasis is laid down on the welfare of the child. If for example the parents of a child leave the child in care of another person and go to a distant place and the person who has the care of the child loses physical possession of the child could it be said that in the law the parents are prohibited from getting back the child because the child was not taken from them. In *Hasmat Ali vs Suraya Begum*[52] this case relating to the rights and status of a mother as the Guardian of her minor children. The appellant and the respondent were, in this case, living in a lawful wedlock when the minor son now of about 4 years, had been living with the respondent, the mother. He was taken away on some pretext, by the father and not allowed to return to his mother. Therefore, the mother moved an application under Section 25 of the Guardian and Wards Act stating that it would be in his interest if the minor son was returned to the custody of his Guardian, the mother the district judge allowed the application.

The appellant, the father, went in a appeal to the High Court against the order of the district judge. The Allahabad High Court considered the position of mother as the Guardian under Muslim Law vis-a-vis the Guardian and Wards Act. "Under Muslim Law, the mother is entitled to Hizanat of her male child until he has completed the age of seven years and of her female child until she has attained puberty".

In *Mt. Siddiqunnisa Bibi vs Nizamuddin Khan*[53] in this case an opinion was developed that Hizanat was not the same as Guardianship of the person. This case also relates to Section 25 of Guardian and Wards Act 1890. In this case the court over ruled its earlier judgment i.e., *Bibi Jal vs Mohd. Ghouse Mohiddin*[54], where Madras High Court has held the mother has come with in the scope of Section 25 of Guardian and Wards Act. While according to the Allahabad High Courts Judgement, Hizanat was not the same as Guardianship of a person and that inspite of the right of Hizanat of a female her Guardianship vests in the natural Guardian, who is this case happened to be the father. The court observed that "Section 4(2) of the Guardian and Wards Act, defining guarding, used the word "care" and not "custody". These words were different though they could also be used synonymously". The Court further observed in this case "the mother may have been in custody of her minor so at one time which custody has been taken away by the father and she may under the law of Hizanat be entitled to the custody of the minor so long as he does not attain the age of seven years; but she is not the Guardian and under Section 25 of the Guardian and Wards Act. She is not entitled to the custody being restored to her". The court held that a mother's right of Hizanat continues even after divorce unless she remarries in which case the minor was removed from the mother's custody, she could exercise her right by filling a suit and not by proceeding under Section 25 of the Guardian and Wards Act 1890, because an application under this Section can only be made by a Guardian.

The Law Commission in its 83rd Report had considered four important questions:

(i) Appointment of Guardian

(ii) Welfare of the minor

(iii) Procedure

(iv) Custody

Regarding the first question as posed above, it is appropriate that the text of the law should be amended by ensuring that the consideration of the welfare of the minor shall be paramount. Such as amendment will settle the position for all times to come, eliminating the possibility of any arguments being taken to the effect that the father must be appoint if he is not unfit.[55]

Regarding the second question as posed above. The court shall have regard in determining whether the appointment of a person as guardian would, or would not be for the welfare of the minor. These matters are age, sex, and religion of the minor and the existence of previous relations of the proposed guardian with the minor or his property. These are all matters personal to the minor if the minor is old enough to form an intelligent preference that preference may also be taken in to account.

The third question relates to a matter of procedure according to the recommendation of the 83rd report of law commission there should be a provision empowering the court to call for periodical reports from the guardian appointed by court about the health, education and welfare of the minor. To achieve this object, law commission recommended two new sub-sections inserted in Section 17 as follows[56]:

"(6) The court may require the person appointed or declared to be the guardian under this Section on the person to whom custody of the minor is entrusted under this act to furnish to the court, at such intervals as the court may in the circumstances of the case, deem fit, periodical reports regarding the health and education of the minor and such other matters relating to his welfare a the court may specify.

(7) The court on receipt of the reports under sub-Section (6), shall consider them as soon as possible and may issue such directions to the guardian or other persons furnishing them as the court may in the interest of the minor think fit".

The fourth question concerns the custody of the child. The law commission recommended that the custody period of that child should be increased. So as to allow mother the custody of the minor child upto 12 years. The period up to the

age of twelve represents the formative years in the life of a child. It is in these formative years that a child develops such qualities as patience, modesty, and honesty, readiness to help and report for others. The education that the child receives in these years should be designed to make him or her a healthy in individual of high intellectual and moral standard, capable of playing an active role in the development of state and society.

(C) APPLICATION OF GUARDIAN AND WARDS ACT OF 1890 ON MUSLIMS

As we all know that Guardian and Wards Act 1890 is a secular Act and apply to all Indians. Therefore it also applied to Muslim. The Act empowers the civil courts to make order appointing or declaring a guardian of the person or property or both of a minor if satisfied that making of such an order "is for the welfare of the minor".

The Act further directs the courts to be guided in the matter of appointment of, or declaration relating to a guardian by "what consistently with the law to which the minor is subject, appears in the circumstance to be for the welfare of the minor, the court are required to have regard the some of the following factors".

(1) age of the minor (2) sex of the minor (3) religion of the minor (4) character and capacity of the proposed guardian, his or her nearness of kin to the minor and any relation that he (or she) may already have with the minor or with the minor' property (5) the wishes of minor's deceased parent, if any (where such wishes are available) (6) the preference of the minor if he/she is "old enough to from an intelligent preference", and (7) the willingness of the proposed guardian to act as.[57]

The Act 1890 further declares in the following three situations courts are prohibited not to inter fear:

Where a guardian of the minor's person, property or both has been lawfully appointed under a will in accordance with the law to which the minor is subject;

(i) Where a minor is a married girl and her husband is not in the opinion of the court, unfit to be the guardian of her person;

(ii) Where the father of the minor is living and is not, in the opinion of the court, unfit to act as the guardian of person for the minor.

(iii) There are some important rules which are deduced from the case law regarding the appointment of the guardian. The court must have followed these principles:

(iv) The appointment of a guardian must as far a possible be consistent with the minor's personal law;

(v) Personal law is to be considered only for the purpose of ascertaining the welfare of the minor; if necessary is should be assigned a relatively subordinate position;

(vi) Court must consider the preferential right of any person to act as guardian unless in the opinion of the court the person is to be unfit;

(vii) Preferential entitlement to guardianship is not binding on the courts. It is the discretion of the court they can meddle with the order of preference and can also wholly ignoring it, appoint a non relative;

(viii) Courts must also consider the personal law of minor;

(ix) In Muslim cases also court must consider question of minor's welfare.

The proviso of Section 19(b) of the Guardian and Wards Act 1890 under which the courts are prevented from appointing a Guardian of person for a minor whose father is alive and is not in the opinion of the court unfit for the purpose. There are some important rules relating to Section 19(b).

The High Court of Allahabad has held that in the presence of a father not unfit for guardianship, the court could appoint neither the father himself nor any other person as the guardian. The father's status was a creation of law not requiring even a declaration.[58]

Section 19(b), also empowers the court to award the Hizanat of child, while the father is alive to be maternal grand mother, the mother being dead and the child being still in the first stage of its minority while some other cases court refused to award Hizanat of a child to one of its mother's substitutes, as against his father. The court only will see the fitness of the guardian, who will be fitted for guardianship of minor person for the welfare of the minor person. On ground of

second marriage father cannot be disqualified from holding Hizanat. Thus Section 19(b) of the Guardian and Wards Act 1890 pose the two question: Where at Muslim Law the Hizanat of a child belongs to his mother or (in her absence) to any of her substitute's can the court award it to her in preference to the child's father (who might be claiming it under the Guardian and Wards Act 1890). The second question is where as Muslim Law guardianship of a person belongs to the father but he is disqualified to hold it, can the court award it to any of its substitute? As regards the first question it seems that the statutory protection of father's right contained in Section 19(b) relates to only one of the two facets of Guardianship of person at Muslim namely Wilayat-e-Nafas, Hizanat is not in its ambit. The answer to the second question will depend on how the court in a particular case interpret the word unfit used in Section 19(b) for example, at Muslim Law one of the causes of fathers disqualifications is his apostasy, and the court too, may regard an apostate father unfit for guardianship, particularly since Section 17 of the Act specifies religion as one of the factor to be considered for determining what will be for the welfare of the child[59] Section 19(b) only protected the right of guardianship of the husband. Husband has not right of Hizanat of minor wife by Section 19(b). The position of minor wife's husband does not seem to be very clear and the question may arise in this regards that to whom will her Hizanat pass on to her father, to her husband or to her mother if the girl is below the age of puberty at the time of her marriage. The answer of the above question is that the Hizanat of Hanafi wife below the age of puberty belongs to her mother in preference to her husband. Guardianship of minor wife will remain to her husband while Hizanat of a minor wife will remain to her mother (including any of her substitutes). As awarding of a minor wife's Hizanat might results into the consummation of the marriage against her consent.

(D) SECTION 19(B)-CONFLICT WITH PERSONAL LAW

In some respect Section 19(b) might be in conflict with personal law, in so far as clause (b) has the effect of giving pre-emptory effect preference to the father even where the father is not the natural and legal Guardian by personal law for example in the case of an illegitimate child, the assumption under laying Section

19(b) totally breaks down. The reason is that the father has no legal right of Guardianship over such a child. This was the position under the codified rules of Hindu law and also the position under its codified version.[60] In Muslim law also, the position is the same. In fact the rights of the mother to custody can be enforced by Habeas corpus.[61]

In case of other communities also the mother is the natural and legal Guardian of the illegitimate child. The rational behind this that paternity is a matter governed by 'jus civil' and maternity by 'jus nature'. The creative forces of nature itself have bound the mother to her issue, Whether born in lawful wedlock, in a manner wholly or utterly different from the relation between the father and his sons. This is the natural relationship.

The second example with respect Section 19(b) might conflict with personal law is in the case of foreigner governed by another system of law, the court will have regard to the system of law by which he is governed, which may not necessarily recognize any preferential status for the father, though the best interests of the child are the paramount.[62]

(E) 133rdREPORT OF LAW COMMISSION AND ITS RECOMMENDATIONS

Law Commission in its 133rd Report makes following recommendations on the issues of child custody:

Mother should have same and equal rights (and not inferior to the father) in respect of the custody of minor's person as well as property. The most serious infirmity in the existing law is revealed by Section 6(a) of Hindu Minority and Guardianship Act 1956 It is provided by the said provision that the natural Guardian of a Hindu Minor in respect of his person as well as his property, in the case of a boy or an unmarried girl will be "the father and after him, the mother". It is thus clear that the provision contained in Section 6(a) of Hindu Minority and Guardianship Act 1956 is extremely unfair and unjust and has become irrelevant and obsolete with the changing times. The concerned provision, therefore, deserves to be amended so as to constitute both the father and the mother as being natural Guardians jointly and severally, having equal rights in respect of a minor

and his property. The provision according preferential treatment to the father vis-a-vis the mother has to be deleted and has to be substituted by a provision according equal treatment to the mother. It also violates the spirit and conscience of Article 15 of the constitution.

The custody of a minor child who has not completed 12 years of age shall ordinarily be with the mother.

The recommendation for amending Section 6 of the Act of 1956 of Hindu Minority and Guardianship Act should also be amended so as to allow the mother the custody of the minor, ordinarily till he or she completes the age of 12 years. The period up to the age of 12 represents the formative years in the life of a child. It is in these formative years that a child develops such qualities as patience, modesty, honesty, readiness to help and respect for others. Now it can not be disputed that it is the mother's influence which moulds the character and qualities of a child. Men are what their mother makes them; no fondest father's fondest care can fashion the child's heart shape his life. The proviso to sub-Section (a) of Section 6 of Hindu Minority and Guardianship Act deserves to be amended so that the custody of a boy or unmarried girl who has not completed the age of 12 years (instead of the age limit of 5 years as prescribed at present) shall ordinarily be with the mother.

The welfare principle projected in Section 13 of the Hindu Minority and Guardianship Act and Section 17 of the Guardian and Ward Act needs to be amplified and spelt out so as to make it explicit that:

(i) Where the 'father' has remarried, the custody of the minor, irrespective of the minors age, shall ordinarily be with the mother. The minor should not be obliged to live with his or her step mother unless there are exceptional circumstances which shall be recorded in writing.

(ii) Where the 'mother' has remarried, a female child should not be made to live with her step father in order to guard against possible sexual harassment. The court may consider whether the paternal or maternal grand parents should be entrusted with the custody of female child.

(iii) Where the 'mother' has remarried but the 'father' has not, ordinarily the minor even a male child, should not be made to live with the 'step father'.

(iv) Where both 'father' and 'mother' have remarried, the court may determine whether, to entrust the Guardianship and/or custody to the father, the mother or the grand parents, depending on what the court considers to be conducive to the maximum welfare of the minor in the light of such case.

(v) A 'mother' shall not be denied the custody of the minor merely on the ground that the father is in more affluent circumstances or that the mother's economic circumstances are not as good as those of the father.

(vi) In applying the welfare principle, the court shall have due regard to the fact that the minor needs emotional support and warmth of the 'mother' who is ordinarily better equipped than the 'father' to import such emotional support and warmth which are essential for building up a balanced personality.

Fourth recommendation relates to custody right of grand parents. Grand parents shall have equal claim in the matter of appointment of Guardian of a minor irrespective of whether they are paternal grand parents or maternal grand parents. In considering the question of appointment of Guardian of the person and property of a minor and entrustment of the custody of a minor, the circumstances Whether the grand parents are from the paternal side or 'maternal' side should be disregarded. The paternal grand parents on the one hand and maternal grand parents on the other hand shall be treated at par having 'equal' claim to be appointed in this behalf subject to the paramount consideration regarding the welfare of the minor.

Fifth recommendation –Recognizing that not only a 'father' but also a 'mother' has a claim, to the exclusion of others, to be appointed a Guardian of a minor unless considered unfit by the court. Section 19(b) of the Guardian and Ward Act 1890, which interalia provides that the court will not be authorized to appoint the Guardian of the person of a minor whose father is living and is not in the opinion of the court, unfit to be the Guardian of the person of the minor, deserves to be amended so as to accord equal treatment to the 'mother' by

incorporating a reference to 'mother' along with that of the 'father'. It should be provided that the court will not be authorized to appoint the Guardian of the person of a minor whose 'father' or 'mother' is living and is, in the opinion of the court, not unfit to be the Guardian of the person of the minor, for there is no rational basis for discriminating between the 'father' of a minor on the one hand and the 'mother' of a minor on the other in the contest of this provision. A consequential amendment also needs to be made in Section 41(e) by substituting the word's father or mother in place of the word 'father' where ever it occurs there in.

(F) CHILD CUSTODY IN INDIA-JUDICIAL RESPONSE

The court has given various interpretation of welfare of the child theory. In some cases court has given preference to the social factor, economic factor, or religious factor, while in some other cases give importance to the psychological factor in deciding the custody of the child. Age, sex, religion and wishes of the child are also considered by the court. But inspite of all these facts, the main guiding principle of the court is the best protection or best interest or we can say that welfare of the child is the paramount consideration and all other consideration are the subordinate to this. In this series we will study those cases where the court considers only the welfare of the child.

In *Sunil Kumar Chowdhary vs Smt. Sati Rani*[63] case held welfare of the minor was prime and sole consideration. This case related to two appeals one was filled by husband against his wife for the restitution of conjugal rights and second filled by the wife for taking the custody of the child. In the second appeal father applied Section 25 of Guardian and Wards Act for the custody of his minor son of 5 years from the custody of mother whom he was driven out of the house 4 years back without caring to know how they were living or making any serious efforts to bring them back. This case related to Section 17, 19, 25 of the Guardian and Wards Act 1890 and Section 13 of the Hindu Minority and Guardianship Act 1956. Justice Mukherjee observed that "Section 13 of the Hindu Minority and Guardianship Act 1956 has brought about a material change, so far as Hindus are concerned. It makes it quite clear that, in all cases, irrespective of the status of the

person, claiming the guardianship, the welfare of the minor would be the paramount consideration".

"Under Section 19 of Guardian and Ward Act so far as the father is concerned his claim for guardianship in the case of a boy of more than 5 years of age would be the paramount consideration. In regard to other persons, claiming guardianship Section 17 of the said Act puts the welfare of the minor in the forefront and makes it the paramount consideration". It was held in this case that minor remains with his mother and the application of the father dismissed. This case depends upon the judgment of the Bimla *bala Dasi vs Bhagirathi Shau*[64], where it was observed by the judge that "in view of Section 19 the father's claim would be paramount consideration. But under present law by Section 13 of the Hindu Minority and Guardianship Act it is quite clear that welfare of the minor would be the paramount consideration".

In *Tarun Ranjun Majumdar vs Sidhartha Datta*[65] case filled under Section 7, 12 and 25 of the Guardian and Ward Act 1890. The court reiterated the cardinal principle in custody suits. The welfare of the child is supreme and not the legal rights of the parties. In this case a tug of war between the father on the one hand and the maternal grandparents on the other over the custody of a child who was aged about 11 months only. Where, the proceedings were initiated in November, 1987. The court observed, "Even if a child is in the custody of one, who has no legal rights there to and its welfare is reasonably looked after in a manner in which it should be, the legal guardian cannot claim an order of return or recovery merely on the strength of the legal right and by parading his financial or other capacity to provide a welfare custody, unless the court forms definite opinion that even though its welfare is reasonably looked after, such order of return would be for its better or further welfare. A legal guardian cannot claim such an order merely by dangling his legal rights". This judgment based upon the observation of the *Raj Kumar vs Barabara*[66] where the division bench observed, "If a mother has in fact the custody of the minor of tender years, even though she may not have the legal right to such custody, the same should not be changed or altered except for compelling reasons"

and in the second case "even though some of the authorities convey the impression that the upset caused to a child by change of custody is transient and a matter of small importance, a growing experience has shown that harm even to young children may on occasion, be caused by such a change." The court held that in deciding any question as to the custody and upbringing of the minor, the court must regard the minor's welfare as the first and paramount consideration and must not take into consideration whether from any other point of view the father's claim in respect of such custody upbringing, administration or application is superior to that of the mother or mother's claim is superior to that of the father. In case of a dispute between the mother and father for the custody of a child it is necessary to strike out a balance between the requirement of the welfare of the minor child and rights of the respective parents over the child. The court mainly concerned with the welfare of the child and not with the right of the parties.

Prakash Chandra Jain vs Smt. Chandrawati Jain[67] in this case the court observed that "the controlling consideration, therefore, for governing the custody of the child is the welfare of the child and not the right and sentiments of the parties. In deciding any question as to the custody and upbringing of the minor the court must regard the minor's welfare as the first and paramount consideration and must not take into consideration whether from any other point of view the father's claim in respect of such custody, up bringing, administration or application is superior to that of the mother or the mother's claim is superior to that of the father. In case of a dispute between mother and father for the custody of the child, it is necessary to strike out a balance between the requirement of the welfare of the minor child and the right of the respective parents over the child the court is mainly concerned with the welfare of the child and not with the right of the parties. The decisions for the custody of the child to a particular person requires a judicial investigation in order to ascertain (1) with whom the child will be happy (2) by whom the health and comforts of the child will be better looked after and to contribute its well being (3) who can bring up the child and give education in a manner in which he deserve to be brought up (4) in whose company the child may grow up in normal balanced manner to be useful member of the society (5) the age

and sex of the child (6) the character and capacity of the father or the mother etc. These are the relevant points of consideration which are required to be looked into at the time of delivery of the custody of the child.

The question of the welfare of the minor child has to be considered in the background of relevant facts and circumstances. Each case has to be decided on its own facts. It is no doubt, true that the father is presumed by the statues to be better suited to look after the welfare of the child, but court has to see that who have better financial resources of either of the parent or their love for the child may be one of the relevant consideration but can not be the sole determining factor for the custody of the child. It is here a heavy duty is cast on the court to exercise its judicial discretion judiciously in the back ground of all the relevant facts and circumstances bearing in mind. The High Court held that welfare of the child as the paramount consideration. It is indeed true that under the Hindu Law, the father is a natural and lawful guardian of his minor children and under ordinary circumstances the court can not take away that guardianship from him. An application for custody by Hindu father as natural guardian is one under Section 6 of Hindu Minority and Guardianship Act 1956 read with Section 25 of the Guardian & Ward Act 1890 and in passing the order there on, consideration should be made under Section 7 and 17 of the latter Act. Even though under Section 6 of the Hindu Minority and Guardianship Act 1956, father is the natural guardian of the minor, but the provision carves an exception laying down that the mother should have the right of custody of the minor up to 5 years or whenever the court deem it just and proper. The guardianship is a scared duty of which the father can not divest himself even if he wishes to do so. He can not of course delegate the performance of the daily duty of looking after the child to some one and for that purpose, place the child in the custody of some body else. If he does so, when he applies for the restoration of the custody, it becomes a question under Section 25 of the Guardian and Ward Act for the court to decide whether it is for the welfare of the child. In certain cases courts do interfere to prevent the revocation of the authority, but there too, the court ought to be satisfied that it is for the welfare of the child. A court dealing with such a matter ought to see itself with the

surrounding circumstances prevailing in the family and the strained relationship in between the father and the mother and the correct position of law is not that just because he has quarreled with the mother or distrusted the mother moral character, the father will be liable to be deprived of the society of his child. The recognized principle is that a father is not only the natural guardian but has an inaliable right to the custody of his minor son unless there are overwhelming circumstances to the contrary and very strong case has to be made out to over rule the right of the father. The court has however discretion in proper cases to deprive the father of his child. But still, it must be a judicial discretion exercised upon recognized principles. However such rights of the father are subject to the paramount consideration of the welfare of the child. The father has generally a legal right to control and direct the education and bringing up of his male child till he attains majority and the court generally does not interfere with the father right in exercise of his paternal authority except:

- Where by his gross moral turpitude or rowdy behavior he forfeits his rights;
- Where he has by his conduct abdicated his paternal authority and, where he seeks to remove his children wards of court out of the jurisdiction without consent of the court. Conduct of parents and wishes of both the parents are matters of primary consideration for the court in deciding the question of custody or access. But where the child has been living with his maternal relation and the father had not since then even seen him and almost estrange himself and there is no other competent female relation living with the father entitled to take care of the child. While on other hand, the maternal relations had strong affection for the child, the custody of the child is apt to be refused to the father. In view of the minor welfare which is primary consideration, some times the court has subordinated the father's claim to that of the maternal relations including the mother.

(a) Economic Interest:

In *Gohar Begum vs Suggi*[68] Case the Supreme Court has considered the economic interest of minor child. Three judges bench heard the appeal justice A.K.

Sarkar observed. "Under the Muslim Law, which applies to this case, the appellant is entitled to the custody of Anjum (the girl in question) who is her illegitimate daughter, no matter who the father is".

The rules of Islamic Law on Mother's right of Hizanat are superb and protect the interest of both the mother and children. Their application in this case keeping in mind the circumstances of the case (the other party claiming custody having no better status and means than the mother) was not assailable on any legally tenable grounds.

(b) Psychological Interest:

The court should consider psychological interest of the child before granting the custody to their parents. In *Mumtaz Begum vs Mubarak Hussain*[69], in this case the child aged about 10 years was in custody of the father. The grand parents were physically handicapped and the father was busy from morning to night. The mother of the child filed a writ of habeas corpus claiming the child. The court held that environment in which the child was being brought up was unsuited an incognito to his mental growth and development and therefore, custody was handed over to the mother. Similarly in *Raj Kumar Gupta vs Barbara Gupta.*[70] In this case the child above 5 had all through stayed with the mother in the matrimonial home. She took away the child from the custody of its guardian within the meaning of Section 25 of Guardian and Wards Act. It was held that the father could not claim the return of the child to him as a mother of right unless the court was of the opinion that the welfare of the child demanded that. The father's plea that the mother was a diabetic or smokes and drinks and so it would not be in the interest of the child to remain with her was not accepted. The court held that diabetes was an ailment which anyone might suffer from and unless it was too such an extent so as to in capitates a person in discharge of duties and obligations, it could not be treated as a bar to having the custody of a child. Like wise, smoking and drinking in the modern society was held not to disqualify a person either. The father was thus refused custody to the child who was already with the mother.

(c) Social Interest:

Besides all other interests the social interest is also more important consideration by the court in giving the custody of a child to his parents. In *Mala Kala Ramu vs Mammadi Gopalamusty.*[71] Where mother had died by burn injuries under mysterious circumstances and criminal cases were filed against his husband and his mother. The father who has remarried also failed to pay any maintenance to the children who were staying with the maternal grand father. The court granted custody to the father as against the grand father with whom the children were staying for seven years.

The Allahabad High Court after studying the cases cited by both the parties observed that "even where mother had died in mysterious circumstances the court has invariably preferred to give custody to the father as against the maternal grand parents while in the facts of circumstances of the cases these could have been the ideal orders in the interest of the children yet there is need to be sensitive to the emotional trauma the up rooting of child from one place to another may cause. It is important also to reflect on the long term implications of such orders or the minds of the children, who as they grew up might suffer. Besides, husbands (fathers) who have harassed their wives (mothers) and killed or driven them to death should not get a message that they will not lose the custody over their children. Strong probability of losing child custody could act as deterrent to husbands victimizing their wives. These considerations just by way of abduction caution, with the paramount consideration being the welfare of the child in all respects".

(d) Legal Interest:

In 1981, Andhra Pradesh High Court gave important judgment regarding the authority of the father over the custody of the child's person.[72] It was held that child must be regarded as a "person" who has a right to life as guaranteed by Article 21 of the Constitution of India "life" in this context to be understood as something comprehending more than mere animal existence, the Bench categorically considered that the theory of father unconstitutional right to child's person and custody contravened this constitutional guarantee. Recognition of said

theory in the opinion of the bench would "almost reduce the child to the position of the chattle from the position of a person.[73] Interpreting Section 25 of the guardian and words Act the Bench said that the custody of a child could be handed over to its father (or another right full guardian) only "subject" to the over riding consideration of the welfare of the minor child. The judgment is in tune with the modern global thinking on the subject which has totally rejected the traditional theory of unconditional parental authority paternal and maternal grand parents of a child stand in the same degree proximity to the child for the purpose of right to guardianship.

(E) Moral and Ethical Interest:

In *M.D. Khalid vs Zeenat Perveen*[74] the court observed. "The children can not be treated as Chattle or property. Their welfare has to be considered more on humanitarian ground and looking into over all welfare of the child. The custody of child is merely in the nature of the trust for his welfare and benefit. Therefore, merely because the father is the natural guardian under the personal law applicable to him, the minor can not be entrusted to his custody".

(F) Physical Well-being:

In *Chandrakala Menon (Mrs.) vs Vipin Menon*[75] the Hon'ble Supreme Court held that the question regarding the custody of a minor child can not be decided on the basis of legal rights of the parties. The custody of a child has to be decided on the sole and predominant criterion of what would be best serve the interest and welfare of the minor. In that case also the girl Sumaya appeared in the chambers and her wishes and sentiments were gathered by Hon'ble Supreme Court. She liked her maternal grand parents and the court came to the conclusion that it would be in the interest and welfare of the minor that she would be permitted to be in the custody of her mother Chandra Kala. The custody of the father was refused.

In *Smt. Surinder Kaur Sandhu vs Harbax Kur Sandhu and others*[76] under the bench of Y. V. Chandra Chud, C.J. and Sabyasachi Mukharji, J., this appeal filed by special leave from the judgment and order dated 26th August 1983 of the

Punjab and Haryana High Court. The brief facts of the case are as follows: That the appellant, Surinder Kaur Sandhu (wife) got married with the Harbax Singh Sandhu in 1975 at District Farid Kot, Punjab according to Sikh rites. Thereafter they shifted to England where a son was born to them in the same year with in a short period after the birth of the boy, the relationship between the spouses came under a strain resulting in a serious episode. On January 31, 1983, while the wife was away at work, the husband removed the boy from England and brought him to India. On the same date the wife obtained an order under Section 41 of the Supreme Court Act, 1981 under which the boy became the ward of the court which effect from that date. By the said order, the husband was directed to handover the custody of the minor boy to the wife or her agent forth with. The wife came back to India in April, 1983. On May 5, 1983 she filed a petition under Section 97 of the Criminal Procedure code in the Court of the learned judicial magistrate First class Jagraon. Section 97 authorises the magistrate to direct a search to be made for persons wrongfully confined and on their being found, to be produced in the court in order to facilitate the passing of such order as the circumstances of the case may require the respondent relied upon Section 6 of the Hindu Minority and Guardianship Act, 1956, and opposed the petition on the ground that respondent I was the natural guardian of the minor boy. Accepting that contention, the learned magistrate dismissed the petition, leaving the question of the custody of the child to be decided in a appropriate proceeding. The wife then went back to England to resume her work. Some later wife came back to Indian once again and filed the present writ petition in the High Court of Punjab and Haryana, asking for the production and custody of her minor son. The Court while giving its judgment follows the decision of the *International Shoe Company vs State of Washington*[77], which was matrimonial case and also regarded as the fountain head of the subsequent developments of jurisdictional issues. The court observed that "the father is a man without a character who offered solicitation to the commission of his wife's murder". The wife obtained an order of probation for him but, he abused her magnanimity by running away with the boy soon after the probationary period was over. Even in that act, he displayed a singular lack of respect for law by

obtaining a duplicate passport for the boy on an untrue misrepresentation that the original passport was lost. The original passport was, to his knowledge, in the keeping of his wife. In this back ground, the court observed that "affluence of the husband's parents to be a circumstance of such overwhelming importance as to till the balance in favour of the father on the question of what is truly for the welfare of the minor. It will be against the welfare and well being of the minor if he will remain with his father who is about 8 years of age. The mother earns an income of £100 a week, which is sufficient for the development and growth of the minor boy". The court held that "Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the Natural Guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. Therefore the custody should be given to the mother".

In the instant case *Pushpa Singh vs Inderjit Singh*[78], the mother filed an appeal under Section 6 of Hindu Minority and Guardianship Act 1956 against the order granting custody of child to respondent, where the child less than five years. A.P. Sen, J. observed that the paramount interest of the child lies in giving his custody to the mother. The child undoubtedly needs affection of his mother for which there is no adequate substitute. The High Court was clearly in error in observing that the proviso to Section 6(a) of the Minority and Guardianship Act, 1956 cannot be attached with importance. The view of the High Court ignores the very mandate of the legislature and runs counter to the mandate. Accordingly the appeal is allowed and the custody of the child should be given to the mother Pushpa Singh. Failure to comply will constitute contempt of court the appellant Pushpa shall be at liberty to move the court for further directions in case of non compliance. It is also directed by the court that the father Inderjit Singh can meet his child twice a month at his in laws place at Luck now on dates intimated by him well in time to the appellant. In my opinion this is the right judgment relating to custody of children where the apex court has observed that custody of children less than five years should be given to the mother because of this age the child demands constant attention and affection. Surely this affection can only be given from the mother.

The land mark judgment came in 1999 where Supreme Court upholding the right of mother to act as Natural guardian during the life time of the father

Gita Hari Haran vs Reserve Bank of India[79] with *Dr. Vandana Shiva vs Jayanta Bandhopadhyaya* and another, the brief facts in this cases are that the husband and wife jointly applied to the Reserve Bank of India for relief bond in the name of their minor son Rishab Baily for Rs. 20,000/- only mother have singed on the prescribed form of application. But the Reserve Bank of India replied to the petitioners advising them either to produce the application form singed by the father of a minor or a certificate of guardianship from a competent authority in favour of the mother. It maintained that the mother is not the natural guardian of a minor and it is also stated in Section 6(a) of the Hindu Minority and Guardianship Act, 1956. There upon the petitioner filed a writ petition under Article 32 with prayers to strike down Section 6(a) of Hindu Minority and Guardianship Act 1956 and Section 19(b) of the Guardian and Wards Act 1890 as voilative of Article 14 and 15 of the constitution and to quash and set aside the decision of Reserve Bank of India refusing to accept the deposit from the petitioners and to issue a mandamus directing the acceptance of same after declaring the mother as the Natural Guardian of the minor. The facts of *Vandana Shiva vs Jayanta Bandhopadhyaya* and another case[80] are as: The petitioner was facing divorce proceedings filed by her husband in which the husband had prayed for custody of their minor son. She in turn had filed an application for maintenance for herself and her son. The husband had been repeatedly writing to her and the school in which the minor was studying, asserting that he was the only natural guardian of the minor and no decision should be taken without his permission there upon she filed a writ petition under Article 32 challenging the constitutionality of Section 6(a) of Hindu Minority and Guardianship Act 1956 and Section 19(b) of the Guardian and Wards Act 1890. She emphasized that while the minor son was staying with her, inspite of her best efforts the father had shown total apathy towards his son and was not interested in his welfare except to claim right of natural guardian without discharging any corresponding obligation. After considering all the facts and circumstances and provisions of the cases the

Supreme Court in Gita Hariharan case observed that "the definition of guardian in Section 4(b) and natural guardian in Section 4(c) of the Hindu Minority and Guardianship Act 1956 do not make any discrimination against the mother and she being one of the guardians mentioned in Section 6 would undoubtedly be a natural guardian as defined in Section 4(c). The expression "the father, and after him, the mother" in Section 6(a) of Hindu Minority and Guardianship Act 1956 does give an impression that mother can be considered to be the natural guardian of the minor only after the lifetime of the father. It is also well settled that the welfare of the minor in the widest sense is the paramount consideration and even during the life time of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of the courts where to do so would be in the interest of the welfare of the minor. The question, however, arises when the mother acts as the guardian of the minor during the life time of the father, without the matter going to the court and the validity of such an action is questioned on the ground that she is not the legal guardian of the minor in view of Section 6(a) of Hindu Minority and Guardianship Act 1956. It is then maintained that she could function as a guardian only after the life time of the father and not during his life time despite his concurrence. However, such an interpretation violates gender equality, one of the basic principles of our constitution. The bench further observed that now Section 6(a) of Hindu Minority and Guardianship Act 1956 is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean "after the life time". In the context in which it appears in Section 6(a) as, it means "in the absence of", the word "absence" there in referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situation the father can be considered to be absent and mother being recognized natural guardian, can

act validly on behalf of the minor as the guardian. Such an interpretation will be natural outcome of a harmonious construction of Section 4 and 6 of Hindu Minority and Guardianship Act 1956, without causing any harm to the language of Section 6(a) of the same Act.

The court further observed that "while both the parents are duty bond to take care of the person and property of their minor child and act in the best interest of his welfare, in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and for mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be absent for the purpose of Section 6(a) of the Hindu Minority and Guardianship Act 1956 and Section 19(b) of the Guardian and Wards Act 1890.

The Supreme court held that the Reserve Bank of India was not right in insisting upon an applications singed by the father or an order of the Court in order to open a deposit account in the name of the minor particularly when there was already a letter jointly written by both the petitioners evidencing their mutual agreement. The Reserve Bank of India must accept the application filed by the mother. The Reserve Bank of India and other organizations may formulate appropriate methodology in the light of the observations made above to meet the situations arising in the contextual facts of a given case. Justice Anand also observe that "the message of international instruments—the convention on the elimination of all form of discrimination against women, (CEDAW), 1979 and the Beijing Declaration which directs all state parties to take appropriate measures to prevent discriminations of all form against women is quite clear. Indian is a signatory to CEDAW having accepted and retified it in june 1993. the interpretation that we have placed on section 6(a) gives effect to the principles contained in these instrument. The domestic Courts are under an obligation to give

due regard to international convention and norms for construing domestic laws when there is no inconsistence between them. Justice Banerjee, observed that "though nobility and self denial coupled with tolerance mark the greatest features of Indian women hood in the past and the cry for equality and equal status being at a very low ebb, but with the passage of time and change of social structure, the same is however, no longer dormant but, presently quite loud. This cry is not restrictive to any particular country but, world over with variation in degree only. Article 2 of Universal Declaration of Human Rights provided that every body is entitled to all rights and freedom without distinction of any kind whatsoever, such as race, sex or religion and the ratification of the convention for elimination for all form of discrimination against the women by the United Nation and Organization in 1979 and subsequent acceptance and ratification by India in June 1993 also amply demonstrate the same".

However, this judgment of Supreme Court will solve problems of many mothers who are practically in charge of the affairs of there minor children, who face harassment from various authorities, who insists on father signature. But a question will still remains open is , what if the father and mother ,along with the child ,are living together and the father is not "absent" within the meaning of the term as defined by the court. Did the court intent to give complete equality to both the parent in the matter of guardian ship in which it would mean either mother /father? However since the court in the present case, has based only on the interpretation of the word "after" the primary clause under which the mother would be the guardian only "after" the father, still stands. The only change the judgement has made is that it has given an extended meaning to word "after" to include several situations, it has not given equal rights of guardian ship on the mother .

In Gita Hariharan case Supreme Court followed the decision of *Jijabai vithalrao Gajre vs Pathan Khan* while *Panni Lal vs Rajinder Singh* was over ruled.

Jijabai vithalrao Gajre vs Pathan Khan[81] and *Panni Lal vs Rajinder Singh*[82] The facts of the Jijabai vithalrao's case are that, the appellant filed an application

before the Tehsildar concerned under the Bombay Tenancy and Agricultural Lands Act, 1958 for termination of the tenancy of the respondent therein after notice to him on the ground of personal requirements. The Tehsildar found that the application was maintainable and within time. But held that the lease deed executed by the Tenant in favour of the appellants mother during his minority when his father was alive was not valid. The aggrieved tenant filed a writ petition under Article 227 of the constitution challenging the said orders. The High Court held that the lease was valid on the ground that mother was the natural guardian because the father was not taking any interest in his minor daughter's affairs and refused to grant the relief of possession but held that the appellant was entitled to resume a portion of the land leased for personal cultivation. Consequently the matter was remanded. The judgment of the High Court was challenged in Supreme Court The Division Bench of the court found that it was the mother who was actually managing the affairs of her minor daughter who was under her care and protection and though the father was alive, he was not taking any interest in the affairs of the minor. The court observed[83] "we have already referred to the facts that the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years. It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection. From 1950 onwards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant. It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was nonexistent so far as the minor appellant was concerned. The court inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before passing of the Hindu Minority and Guardianship Act 1956, the mother is the natural guardian after the father. Section 6 of this Act declares that father is the natural guardian and after him the mother. The position in Hindu Law before this enactment was also the same. Therefore it was stated that normally when the father is alive he is the natural guardian. But on the facts found above the court held that "the mother was

rightly treated by the High Court as the natural guardian. Consequently the bench dismissed the appeal". In *Panni Lal vs Rijander Singh*[84] case, property belonging to minors mother acting as their guardian to the appellant under a registered sale deed. Upon attaining majority, the respondent sued the appellant for possession of the land on the ground that the sale having been made without the permission of the court was void. The appellant relied heavily on the fact that the sale deed was attested by the father of the respondents and contended that it should be deemed to be a sale validly made by the legal guardian of the respondents. It was also argued that the sale was for legal necessity as well as for the benefit of the respondents. The Trail court found that there was no reliable evidence on record to show that the sale was made for legal necessity or for the benefit of the respondents and having been effected without the permission of the court was voidable ultimately, the Trial court held that "the same to be void and granted a decree as prayed for by the respondents. That was affirmed by the District and High Court. The court observed that "there was no evidence to show that the father of the minor respondents was not taking any interest in their affairs or that they were in the keeping and the care of the mother to the exclusion of the father an inference drawn from the factum of attestation of the sale deed that the father was very much present in the picture". The bench held that "the father had attested the deed, could not be held to be a sale by the father and the guardian satisfying the requirements of Section 8". Confirming the decrees of the courts below the bench observed, "The provision of Section 8 devised to fully protect the property of a minor, even from the depredations of his parents. Section 8 empowers only the legal guardian to alienate a minors immovable property provided it is for the necessity or benefit of the minor or his estate and it further requires that such alienation shall be effected after the permission of the court has been obtained. It is difficult therefore, to hold that the sale was viodable not void, by reason of the fact that the mother of the minor respondents signed the sale deed and the father attested it." Thus, in Panni Lal's case the sale was not supported by legal necessity; was not for the benefit of the minor and the same had been effected without the permission of the court.

Sarita Sharma vs Sushil Sharma[85], *G.T. Nanavati* and S.N. Phukan, J.J. This appeal is filed against the judgment and order of the High Court of Delhi. Sushil Sharma had filed the writ petition seeking a writ of Habeas corpus in respect of two minor children Neil and Monica, aged 7, and 3 years respectively. It alleged that the children are in illegal custody of Sarita Sharma, whom he had married on 23.12.1998. The High Court allowed the petition and directed the Sarita to restore the custody of two children to Sushil Sharma. The passport of the two children were also ordered to be handed over to Sushil Sharma and it was also declared that it was open to Sushil Sharma to take the children to USA without any obstacle. Sarita has, therefore, filed this appeal. Sushil initiated divorce proceedings for dissolution of his marriage in USA even while divorce proceedings were pending Sushil and Sarita lived together from November 1996 to March 1997. They again separated. This time Sarita had taken children along with her and Sushil got the information from the school that the children were not brought back to the school. On making inquires he came to know that Sarita had vacated her apartment and gone away somewhere. He had therefore, informed the police and a warrant for her arrest was also issued. It was further stated in the petition that his further inquires revealed that Sarita had, with out obtaining any order from the American Court, flown away to India with the children. The Supreme Court follows the judgment of *Sandhu vs Harbax Singh Sandhu*[86], where the husband had removed the boy from England and brought him to India and the wife after obtaining an order of the English Court, came to India and filed a petition in the High Court of Punjab and Haryana seeking a writ of Habeas corpus. The High Court rejected the wife petition on the ground, interalia, that her status in England is that of a foreign, a factory worker and a wife living separately from the husband; that she had no relatives in England; and that, the child would have to live lonely and dismat surroundings in England. It was also dismissed on the ground that the husband had gone through a traumatic experience of a conviction on a criminal charge; that he was back home in an atmosphere which welcomed him; that his parents were in affluent circumstances; and that, the child would grow in an atmosphere of self confidence and self respect if he was permitted to live with them. In this case court

gave custody to the mother. Although under Section 6 of the Hindu Minority and Guardianship Act 1956 father is the natural guardian of his minor children. But that provision cannot supersede the paramount consideration as to what is conductive to the welfare of the minor. In Sushil Sharma's case, after considering the facts and circumstances of the case, the Supreme Court gave the custody of the child to the mother and observed that, "it will not be proper to be guided entirely by the facts that the appellant Sarita had removed the children from USA despite the order of the Court of the country. So also, in view of the facts and circumstances of the case the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children". After inquiry court found that in USA respondent Sushil is staying along with the mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in USA they may be able to get better education. Out of them one is female child. She is aged about 5 years. Both the children were desired to stay with the mother. Considering all the aspects relating to the welfare of the children, Judge of the Supreme Court further observed "that inspite of the order passed by the USA Court, it was not proper for the High Court to have allowed the Habeas corpus writ petition and directed the appellant to handover custody of the children to the respondent and permit him to take them away to USA and what would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to USA in the interest of the children. Therefore, the court further observed "that it is not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to USA with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the court in USA the circumstances under which she had left USA with the children without taking permission of the court. There is a possibility that both of them may thereafter be

able to approach the court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights".

In *Sheila B. Das vs P.R. Sugasree*[87], B.P. Singh and Altamas Kabir, J.J, the instant appeal filled by the appellant (mother) against the judgment and order of Kerela High Court. Here the appellant was a doctor by profession and respondent was a lawyer by profession. They have married and girl child, Ritwika, was born on the 20th June 1993. After sometime the relationship gets strained and the appellant left her matrimonial home along with her child. This application filed under Section 7 and 25 of Guardian and Wards Act, 1890 and under Section 6 of Hindu Minority and Guardianship Act, 1956.

The High Court allowed the applications of the respondent and gave the custody of the child to the respondent (father). Being dissatisfied with the order of the family court, the appellant herein filed an appeal in the High Court of Kerela wherein an order of the family court was stayed. The respondent thereupon filed an application before the High Court for review of the said order and in the pending proceedings a direction was given by the High Court to the family court to interview the minor child. The report of the family court shows that the minor child preferred to stay with her father and ultimately High Court vacated the stay granted by it on 21st May, 2001. The High Court confirmed the order of the family court and given the custody to the father. High Court, however, permitted the mother to visit the child at the house of the father once in a month and with the direction that she will not be removed from the father's house.

Appellant citied various case law in support of her arguments i.e. *Hoshie Shavaksha Dolikuka vs Thirty Hosie Dalikuka*[88]. *Saras Watibai Shripad Ved vs Shri Pad Vasanji Ved*[89], *Rosy Jacob vs Jacob A. Chakrama Khal.*[90]

The Supreme Court dissented from all the above judgment and the court held that in the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the courts, keeping in view the fact that paramount consideration in such cases was the interest and well being of the minor. In this case the Supreme

Court observed that "there is no reason to consider the respondent ineligible to look after the minor. In fact after having obtained custody of the minor child, the respondent does not appear to have neglected the minor or to look after all her needs the child appears to be happy in the respondents company and has also been doing consistently well in school. The respondent appears to be financially stable and is not also disqualified in anyway from being the guardian of the minor child". No allegations other than his purported apathy towards the minor, has been leveled against the respondent by the appellant. Such allegations are not borne out from the materials before the court and are not sufficient to make the respondent ineligible to act as the guardian of the minor.

Therefore, custody of the child given to the father (Respondent) and visitation rights given to the mother and the appeal dispose of by retaining the order passed by the learned judge of the family court at the issue on the application of respondent under Sections 7 and 25 of the Guardian and Wards Act 1956.

Lekha vs P. Anil Kumar[91], *AR Lakhmanan and Altamas Kabir* JJ, The appellant gave his daughter (mithu) in marriage to Abhijit Kundu on August 8, 1995. The marriage was performed according to Hindu rites and ceremonies. Sufficient amount of dowry was given to the respondent. According to the allegation of the appellants, the respondent and his mother were not satisfied with the dowry and they started to torture Mithu for bringing more money from the appellants. On November 18, 1999, a male child Antariksh was born from the said wedlock the appellant thought that after the birth of son, torture on Mithu would be stopped. Unfortunately, it did not so happen. Mithu was totally neglected and the harassment continued. She became seriously sick. In the night of April 9, 2004 as alleged by the appellant's, Mithu was brutally assaulted by the respondent and his mother and when she was brought to hospital she was declared dead. Immediately on the next day i.e. on 10 April, 2004, appellant No. I lodge First Information Report (FIR) against the respondents and his mother under Section 498 A and 304 Indian Penal Code. The respondent was arrested by the police in that case.

On April 18, 2004 custody of Antariksh was handed over to the appellants. Antariksha was found in sick condition from the residence of the respondent. At that time he was only of five years. It was his maternal grand father appellant no. I, who maintained the child with utmost love and affection,. After the respondent was enlarged on bail, he filed an application under the Guardian and Wards Act 1890. Praying for custody of Antariksha. A reply was filed by the appellants to the said application strongly objecting to the prayer made by the respondent. It was expressly stated in the reply that custody of child Antariksh was given to them because when he was found in ailing condition in the house of respondent. The trial court, after considering the evidence on record, allowed the application and held that respondent was father and natural guardian of minor and the present and future of minor would be better secured in the custody of respondent. Accordingly it passed an order that custody of minor (Antariksh) be immediately given to the father.

Being aggrieved by the said order, the appellants approached the High Court. But the High Court also, by the order impugned in the present appeal, dismissed the appeal holding that the trial court was right in ordering custody to be given to the father and the said order did not suffer from infirmity. The division bench of the High Court, therefore, directed the appellants to hand over the child Antariksh's custody to his father with visitation rights to the appellants. The said order is challenged by the appellant in Supreme Court. The Supreme Court in this case observed that the child observed that the child desire to stay with his mother. His mother's` second marriage, instead of proving to be a disadvantage, has proved to be beneficial for the child who seems to be happy. We are therefore, inclined to restore the order passed by the family Court and to give custody of the minor boy to his mother, but as indicated herein before. The Court further observed that we do not want the child grow up with knowing the love and affection of his natural father who too has a right to help in the child's upbringing. We are of the view that although the custody of the minor child is being given to the mother, the child should also get sufficient exposure to his natural father and accordingly we permit the respondent to have custody of the child from appellant

during Onam and other important festivals and during the schools vacation we make it clear that the appellant (mother) shall handover the child to the respondent (father) during every mid summer vacation for about a month with out adversely affecting the child's education. The appellant should not also prevent the respondent (father) from to see the child during weekends and the appellant should make necessary arrangements for the respondent to meet his child on such occasions. The appellant should not also prevent the child from receiving any gift that may be given by the respondent (father) to the child. Therefore, the Supreme Court has hand over the custody of child to the mother. The Court relied upon the decisions of the previous cases judgments. Like *Saras Wati Bai Shri Pad vs Shri Pad Vasanji*[92], *Rosy Jacob vs Jacob A Chakramakkal*[93], Thirty *Hoshie Dolikuka vs Hoshiam Savaksha Dolikuka*[94], *Kirti Kumar Maheshanker Joshi vs Pradip Kumar Karuna Shanker Joshi.*[95]

In Saras Wati bai Shri Pad's case the High Court of Bombay held that, "it is not the welfare of the father, nor the welfare of the mother that is paramount consideration for the court it is the welfare of the minor and minor alone which is the paramount consideration".

In Rosy Jacob's case the court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the right of ward's health, maintenance and education. The power and duty of the court under the Act is the welfare of the minor. In considering the welfare of the minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father can not promote the welfare of the children, he may be refused, such guardianship. The court further observed "that merely because there is no defect in his personal care and his attachment for his children which every normal parent has; he would not be granted custody simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him". The court also observed that "children neither are not mere chattels nor are they toys for their parents. Absolute right of parents over the

destinies and the lives of their children has, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father is expected to strike a just and proper balance between the requirement of welfare of the minor children and the rights of their respective parents over them".

Similarly in Thirty *Hoshie Dolikuka vs Hoshian Savaksha Dolikuka*[96], the Supreme Court reiterated that "only consideration of the court in deciding the questions of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the court. Mature thinking is indeed necessary in such situation to decide what will ensure to the benefit and welfare of the child".

In *Kirti Kumar Mahesh Anker Joshi vs Pradip Kumar Karuna Shanker Joshi*[97], where the custody of two minor children was sought. Mother died unnatural death and the father was facing charge under Section 498A, Indian Penal Code (IPC). Children were staying with maternal uncle. Before Supreme Court, both the children expressed their desire to stay with maternal uncle and not with the father. After considering the facts and circumstances of the case the court rejected the prayer of the father for custody and granting custody to the maternal uncle. The court observed that "After talking to children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father Pradip Kumar. Although the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who are intelligent enough to understand their well being the custody granted to their uncle".

In the year 2006 Supreme Court gave judgment relating to the custody of minor. In *Mausami Moitra Ganguli vs Jayant Ganguli*[98] C.K. Thakker and D.K. Jain, J.J., where the appellant mother was living separately on account of cruelty. The appellant was a teacher drawing a salary of Rs. 22,000 per month. The

respondent was a private contractor having irregular income, Respondent claimed that the child was studying in a prestigious school at Allahabad for which he way paying fee of Rs. 25,000 per annum and has also nominated him in his insurance policy. As regards his financial position, it was stated that he owns a house, telephone and a motor car where as the appellant has no house of her own and is living with her mother and brother in a two room flat at Calcutta. The family court held that for the welfare of the child, the custody should be with the mother. Accordingly, the application was allowed, the appellant was declared to be the lawful guardian of her minor. Being aggrieved, the respondent preferred a regular appeal to the High Court; the High Court has set aside the order of the family court and granted permanent custody of Satyajeet to the respondent after knowing the wishes of the child. Consequently, the custody of the child was restored to the father. It is this order of the High Court which is under challenge in the present appeal, the provisions of law pertaining to the custody of a child contained in under the Guardians and Wards Act, 1890s (Section 17) or the Child Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statue, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents in so far as the factual aspects of the case concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resource of either of the presents or their love for the child may be one of the considerations but can not be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the back ground of all the relevant facts and circumstances bearing in mind the welfare of the child as the paramount consideration. After considering the material on record and the observations made by the courts below. The Supreme Court had observed. "There is nothing on record to suggest that the welfare of the child is in anyway imperiling in the hands

of the father". The court further observed that, "the stability and security of the child is also an ingredient for a full development of child's talent and personality. As noted above, the appellant is a teacher, now employed in a school of Panipat, where she had shifted from Chandigarh some time back. Earlier she was teaching in same school and Calcutta, admittedly, she is living all alone. Except for a very short duration when he was with the appellant, Master Satyajeet has been living and studying in Allahabad in a good school and is stated to have his small group of friends there. At Panipat, it would be an entirely new environment for him as compared to Allahabad".

The Supreme Court further observed that, "after interviewed Satyajeet it is not accepted that appellant the father does not have sufficient time or resources to look after the welfare of the child. The apex court opined that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up insufficiently good surroundings would not only impede his schooling, it may also cause emotional strain and depression to him." The Supreme Court further observed that "it would be better if the child could stay with his mother for some more time. He started crying and showed reluctance to go with the mother. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child." The Supreme Court held that "the welfare of the child will be best served if he continues to be in the custody of the father. And it is not desirable to disturb the custody of master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserve to be maintained."

In the year of 2008 the important case relating to custody of child is *Mohan Kumar Rayana vs Komal Mohan Rayna*[99], C.K. Thakker and Altamas Kabir, J.J. The appeals arise out of the circumstance wherein owing to disputes and differences between married couples, the child born of the wedlock has become the object of a tussle for custody between the two parents. The appellant, who is the husband of the respondent, married the respondent on 2nd March 2002. A daughter was born to them and she was named Anisha. Initially there were no

disputes as such between the parties but after the daughter's birth the atmosphere in the marital home began to change. Respondent (mother) moved the family court seeking custody of her minor daughter under Section 6 of the Hindu Minority and Guardianship Act 1956 read with Sections 7 and 25 of the Guardian and Wards Act 1890. The appellant (father) herein also filed a custody petition, and both the applications were taken up for hearing together by the learned family court. By its judgment dated 2nd February 2007 the family court dismissed the appellant's application for custody and allowed the application field by the respondent. The Appellant (Mohan Kumar Rayana) is directed to hand over custody of the minor daughter Anisha to the petitioner (mother) Komal Rayana immediately. Aggrieved by the said judgment and order of the family court the appellant filed family court appeal before the Bombay High Court. The High Court directing that the minor child would be available to the appellant. It was also stipulated that whenever the appellant was not available in Bombay the child should remain with the respondent.

The Supreme Court observed that since these appeals have been preferred against the interim orders passed by the Bombay High Court in the two pending family court appeals, learned counsel for the appellant, submitted that in these appeals the only grievance of the appellant was with regard to denial of complete access to his child. He prayed that the visitation rights which had been granted by the family court be restored during the pendency of the two appeals in the Bombay High Court.

The Supreme Court further observed that "after having looked through the materials on record and after considering the views of the parties and the minor girl, the Supreme Court observed "that the appellant should not be denial complete access to his minor child, even if there has been a default in complying with the directions of the High Court and pending the disposal of the appeals, he should be allowed to have access to his minor child at least to some extent".

In the year of 2009 Supreme Court had given the judgment in *Gurave Nagpal vs Sumedha Nagpal*[100], relating to the custody of the child, by Dr. Arijit

Pasayat J.J. Where the parties got married on 14.10.1996 and the child from their wedlock was born on 15.11.1997. According to the appellant, respondent abandoned the child but she filed a Habeas corpus petition before the Delhi High Court. The High Court dismissed the petition on the ground of territorial jurisdiction. Respondent filed a special leave petition against the High Court and also filed a writ petition under Article 32 of the Constitution of India, 1950. The High Court permitted interim custody of the 20month's old child with the appellant; the respondent filed a maintenance petition before the Delhi High Court and also a petition for guardianship before a learned Additional District Judge, Jhajjar. The same was later withdrawn and the petition was filed in the District Court, Gurgaon. Appellant filed his reply opposing the application on the ground that the respondent had deserted the child. Learned Civil Judge dismissed the application for interim custody holding that any disturbance by holding the custody of the child would traumatize him and shall not be conducive to the welfare of the child and it would affect the mental balance of the child who had developed love and affection for his father and his family members. A revision petition was filed by the respondent before the High Court. The High Court granted the visitation rights to the respondent but continue the interim custody with the appellant. A counter petition was filed for violation of the terms by the appellant. The learned district judge, Gurgaon allowed the petition of the respondent and granted custody of the child to the respondent. Appellant preferred an appeal before the High Court against the order.

The High Court passed an interim order staying the order of custody to the respondent but continued the order with respect to visitation rights. Appeal filed by the appellant was dismissed. Though, the initial order of the High Court was stayed, subsequently by order. The visitation rights were continued. The High Court observed as follows. "In view of the facts noticed herein before, the question that arises this court's mind is that should the child be permitted to stay with a father, who inculcates fear and apprehension in the mind of minor, against his mother and the Wards Court, orders with impunity. The answer to the above questions, in my opinion, must be in the negative. The appellant cannot wish away

his role in the minor harboring such an irrational fear towards the mother I am conscious of the fact that directing the custody of the child to the Respondent may result in a degree of trauma. However, the daily trauma the child appears to undergo while being tutored against its mother would be far in excess of the trauma likely to be based while entrusting to the respondent. The minor child must be allowed to grow up with a healthy regard for both parents. A parent in this case, the appellant, who poisons the minor's mind against the other parent, cannot possibly be stated to act for the welfare of the minor."

The High Court further observed that the financial status of the respondent and large area of accommodation cannot be determinative factor. Therefore, the High Court did not find any scope for interference with the order of the Trial Court. Some case referred by the appellant counsel *Saraswati Bai Shri Pad vs Shri Pad Vasanji*[101], "It is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the court. It is the welfare of the minor and the minor alone which is the paramount consideration.[102]

Thus, the Supreme Court held that the High Court's order to grant custody to the mother does not in our view form any infirmly. It is true that taking the child out of the father's custody may cause some problems, but that is bound to be neutralized. The Supreme Court upheld the decision of the High Court with some modifications (1) during long holidays/ vacations covering more than two weeks the child will be allowed to be in the company of the father for a period of seven days. (2) The period shall be fixed by the father after due intimation to the mother who shall permit the child to go with the father to go with the father for the aforesaid period. (3) For twice every month preferably on Saturday or Sunday or a festival day, mother shall allow the child to visit the farther from morning to evening. Father shall take the child and leave him back at the mother's place on such days. Therefore the appeal was dismissed. The Supreme Court relied on the following cases judgments. In *Rosy Jacob vs Jacob A. Chakramakkal*[103], the Supreme Court held that object purpose of 1890 Act is not merely physical custody of the minor but of due protection of the rights of ward's health,

maintenance and education. The power and duty of the court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of children, he may be refused such guardianship. Similarly, In *Surendra Kaur Sandhu (Smt.) vs Harbax Singh Sandhu,* the Supreme Court held that Section 6 of the Act constitutes father as a natural guardian of a minor son. But that provision cannot supersede that paramount consideration as what is conducive to the welfare of the minor. Therefore, the Supreme Court held in this case that "when the court is conferential with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to lock at issue on legalistic basis, in such matters; human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor". As observed recently in *Mausami Moitra Ganguli's* case (Supra), the court has to give due weight age to the child's ordinary contentment, health, education, intellectual development and favorable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the other.

In *Athar Hussain vs Syed Siraj Ahmad and Others*[104]; Tarun Chatterjee and *vs Sirpurkar, JJ* here the appellant is the father of the minor children in whose respect interim custody and guardianship have been sought for. Respondent 1 is the maternal grandfather of the two minor children of the appellant and Respondents 2, 3 and 4 are their maternal aunt and uncles. The appellant married one Umme Asma, daughter of Respondent 1, in accordance with Islamic rites and customs. Two children were born from the wedlock, Athiya Ali, aged about 13 years and Aayn Ali, aged about 5 years. Their mother Umme Asma died. Subsequent to the death of Umme Asma, the mother of two minor children, the appellant again married one Jawahar Sultana on 25.03.2007 who in the pending proceeding had filed an application before the Family Court for her implement in the same. The Family Court disposed of the application under Section 12 read with

Order 39 Rules 1 and passed an ex parte interim order restraining the appellant from interfering with the custody of the two children of the appellant.

Therefore, the appellant filed an application against the order of the Family Court under Order 39 Rule 4 of the Code praying for vacation of interim order of injunction passed against him. The Family Court by its order vacated the interim order of injunction. The Family court found the balance of convenience also learning in favour of the appellant, who is admittedly the natural guardian of the children. The photographs produced by both the parties were considered as indicating that the children shared with both. It was found that they were also happy in the company of their stepmother. Though Athiya had stated that she was not willing to go with her father. The Family Court observed that it could be of no consequence as she was not old enough to form a mature opinion and was susceptible to tutoring. The fact that the son went to the appellant when he saw him in the court premises indicated that the children were close to the appellant. According, balance of convenience was found tilting in favour of the appellant. Aggrieved by this order, the respondent filed a writ petition before the High Court of Karnataka at Bangalore. The High Court by its order had set aside the order of the Family Court by which it had vacated the interim order of injunction. The High Court observed that merely because the father has love and affection for his children and is not otherwise shown unfit to take care of the children, it cannot be necessarily concluded that the welfare of the children will be taken care of once their custody is given to him. The girl had expressed a marked reluctance to stay with her father. The High Court was of the opinion that the children had developed long standing affection towards their maternal grandfather, aunt and uncles. The sex of the minor girl who would soon face the difficulties of attaining adolescence is an important consideration, though not a conclusive one. She will benefit from the guidance of her maternal aunt, if custody is given to the respondents, which the appellant will be in no position to provide. Further, there is a special bonding between the children and it is desirable that they stay together with their maternal grandfather, uncles and aunt.

In case of custody of the minor children, the family law i.e. the Mohammedan Law would apply in place of the Act, The High Court had held that the preferential rights regard the custody of the minor children rest with the maternal grandparents. After making a doubtful proposition that in case of a conflict between personal law and the welfare of the children, the former shall prevail, the High Court held that in the case at hand there is no such conflict. For the reasons aforementioned, the High Court by its impugned order set aside the order of the Family Court, Bangalore, which vacated the interim order of injunction issued against the appellant. It is this order of the High Court, which is challenged before the Supreme Court by way of a special leave petition which on grant of leave have been heard by Supreme Court in the presence of the learned counsel appearing on behalf of the parties. In this case Supreme Court followed the Judgment of *Siddiqunnisa Bibi vs Nizamuddin Khan*[105], this was a case concerning the right to custody under the Mohammedan Law, A question has been raised before the Supreme Court whether the right under the Mohammedan Law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct?. The right to the custody of such a minor vested in her female relations is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child should be continue by the father in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father.

The Supreme Court held that the question of guardianship can be independent of and distinct from that of custody in the facts and circumstances of each case. Keeping in mind the paramount consideration of the welfare of the children, apex court gave preference to the maternal relations Inspite of the fact that the father is the natural guardian of his children.

In *Vikram Vir Vohra vs Shalini Bhalla*[106]; G.S. Singhvi and A.K. Ganguly, JJ. the parties to the present appeal were married as per the Hindu rites on 10.12.2000. A child, Master Shivam was born to them on 05.08.2002. In view of irreconcilable differences between the parties they had agreed for a divorce by mutual consent under Section 13-B of the Act and filed a petition to that effect and a decree of divorce on mutual consent was passed by the Additional District Judge, Delhi. Thereafter the respondent wife filed applications and the appellant husband also filed applications under Section 26 of the Act seeking modification of those terms and conditions about the custody of the child. The Trial Court had allowed the respondent to take the child with her to Australia but also directed her to bring the child back to India for allowing the father visitation rights twice in a year i.e. for two terms, between 18th of December to 26th of January and then from 26th of June to 11th of July. Being aggrieved by that order of the Trial Court, the appellant appealed to the High Court. The High Court took into consideration the provisions of Section 26 of the Act and was of the view that the aforesaid provision is intended to enable the court to pass suitable orders from time to time to protect the interest of minor children. However, the High Court held that after the final order is passed in original petition of divorce for the custody of the minor child, the other party cannot file any number of fresh petitions ignoring the earlier order passed by the Court. The Court took into consideration that even if the terms and conditions regarding the custody and visitation rights of the child are not specifically contained in the decree, they do form part of the petition seeking divorce by mutual consent. It was of the view that absence of the terms and conditions in the decree does not disentitle the respondent to file an application under Section 26 of the Act seeking revocation of the visitation rights of the appellant.

It is important to mention here that the learned Judge of the High Court had personally interviewed the child who was about 7 years old to ascertain his wishes. The child in categorical terms expressed his desire to be in the custody and guardianship of his mother, the respondent. The child appeared to be quite intelligent. The child was specifically asked if he wanted to live with his father in India but he unequivocally refused to go with or stay with him. He made it clear in

his expression that he was happy with his mother and maternal grandmother and desired only to live with his mother. The aforesaid procedure was also followed by the learned Trial Court and it was also of the same view after talking with the child.

Being aggrieved by the judgment of the High Court the appellant has approached to Supreme Court and hence this appeal by way of special leave petition. The Supreme Court observed that "custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child". The Supreme Court followed *Dhanwanti Joshi vs Madhav Unde* case.[107] These principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a straitjacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.

The Supreme Court held that the respondent mother is getting a better job opportunity in Australia. Her autonomy on her personhood cannot be curtailed by the Court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent mother cannot be asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both. The Court gives visitation right to the father.

Gaytri Bajaj vs Jiten Bhalla[108] In this case the Wife and the husband were married on 10.12.1992 and two daughters were born out of the said wedlock. It is

the grievance of the petitioner-wife that the Additional District Judge by order dated 03.06.2003 passed a decree of divorce within eight days from the presentation of the first and second Motions under Section 13-B (1) of the Hindu Marriage Act, 1955. The petitioner-wife has filed a suit for declaration on 01.02.2006 seeking a declaratory decree that the respondent has obtained a decree by fraud. On 10.10.2007, the respondent-husband filed an appeal under Section 28 of the Act in the High Court of Delhi. The petitioner-wife filed cross-objections to the said appeal on 07.11.2007. The learned single Judge of the High Court, by order dated 08.09.2008, allowed the appeal filed by the respondent-husband without deciding and adjudicating on the cross-objections filed by the petitioner-wife. Being aggrieved by the order of the learned single Judge, the respondent-wife filed a review petition on 13.10.2008. The said review petition was also dismissed on 10.07.2009 by the learned single Judge of the High Court. Both the said orders were impugned in the present special leave petitions. By order dated 14.12.2009, High Court issued notice to the respondent-husband.

The question before the court is with regard to the custody of the two children. At the request of counsel for both sides, the court decided to interact with the children as well as their parents, namely, petitioner-wife and respondent-husband in the court Chambers to find out the actual friction in order to arrive at the possibility of any amicable settlement. Pursuant to the same, both parties including their children were present before the court and a detailed interaction was held with the children and their parents separately. In the course of interaction, The Court ascertain the following facts:

The date of birth of first daughter is 20.08.1995 and presently she is aged about 17 years. The date of birth of second daughter is 19.04.2000 and presently she is aged about 11 years. Both of them were living with their father and are in his custody and the petitioner-wife had no access to the children or even a brief meeting with them.

After interacting with the children separately and putting several questions about their age, education, their future and importance of company of mother as of

now, both of them were very clear and firm that they want to continue to live with their father and they do not want to go with their mother. In the aforesaid facts and circumstances, the court observed that if the children are forcibly taken away from the father and handed over to the mother, undoubtedly, it will affect their mental condition and it will not be desirable in the interest of their betterment and studies. In such a situation, the better course would be that the mother should first be allowed to make initial contact with the children, build up relationship with them and gradually restore her position as their mother.

In a matter relating to the custody of children the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Even the statues, namely, the Guardianship and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956 make it clear that the welfare of the child is a predominant consideration. In a matter of this nature, particularly, when father and mother fighting their case without reference to the welfare of the child, a heavy duty is cast upon the Court to exercise its discretion judiciously bearing in mind the welfare of the child as paramount consideration.

In the relevant facts and circumstances of the case, the court further observed that the interest and welfare of the children will be best served if they continue to be in the custody of the father. At present, it is not desirable to disturb the custody with the father. The court held, feel that ends of justice would be met by providing visitation rights to the mother. In fact, during the hearing on 12.12.2011, Ms. Indu Malhotra, learned senior counsel for the petitioner-wife represented that if such visitation rights, namely, visiting her children once in a fortnight is ordered that would satisfy the petitioner-wife. Learned senior counsel also represented that if the said method materializes, the petitioner-wife is willing to withdraw all civil and criminal cases filed against the respondent-husband which are pending in various courts. Mr. Ranjit Kumar, learned senior counsel for the respondent-husband made it clear that this Court is free to pass appropriate interim arrangement if the same is feasible and in the interest of the children. Since both are residing at Delhi, it is desirable to pass appropriate direction for the

meeting of the petitioner-wife either in the house of the respondent-husband or in a common place like Mediation Centre of this Court or the High Court.

The Court accordingly, make the following interim arrangement:

(i) The respondent-husband is directed to bring both daughters, namely, Kirti Bhalla and Ridhi Bhalla, to the Supreme Court Mediation Centre at 10 a.m. on Saturday of every fortnight and hand over both of them to the petitioner-wife. The mother is free to interact with them and take them out and keep them in her house for overnight stay. On the next day, i.e., Sunday at 10 a.m. the petitioner-wife is directed to hand over the children at the residence of the respondent-husband. The above arrangement shall commence from 17.12.2011 and continue till the end of January, 2012.

(ii) The respondent-husband is directed to inform the mobile number of elder daughter (in the course of hearing, the court were informed that she is having separate mobile phone) and also landline number to enable the petitioner-wife to interact with the children.

Inasmuch as the petitioner-wife is willing to withdraw all civil and criminal proceedings filed against the respondent- husband, in view of the interim visitation rights being granted to her, the court hope and trust that the respondent-husband will cooperate and persuade the children to spend time with their mother as directed above.

It is also made clear that for any reason if the said visitation is not workable due to the attitude of any of the parties or due to the children, counsel appearing for them are free to mention before this Court for the next course of action.

CONCLUSION

"The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children's rights and interests. In order to effectively

guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child."[109]

The Best Interest of Child doctrine has indeed dramatically influenced family law jurisprudence globally, and that has had a dramatic effect on the family. This chapter still does not presume to know what the best interests of the child really are, but rather has illuminated the foundations of a doctrine rooted in parental protection and manifested in a legal standard regarding children to assist judicial decision-making for what is "best for a child."

A plethora of decisions of the Supreme Court endorse the proposition that in matters of custody of children, their welfare shall be the focal point. If the focus shifts from the rights of the contesting relatives to the welfare of the minor children, the consideration in determining the questions of balance of convenience also differ. Therefore, after analyzing the position of the mother and welfare of the child through judicial pronouncements it is observed that Supreme Court has in most of the cases followed its earlier decision i.e. *Smt. Surender Kaur Sandhu vs Harbax Singh Kaur Sandhu*; and Rosy Jacob Chakkrmal. These two judgments are very important in relation to the custody of the child, where the Supreme Court held that Section 6 of the Hindu Minority and Guardianship Act 1956 cannot supersede the paramount consideration i.e. the welfare of the child, judicial trend also support to mother rather than father. The Court always sees the welfare of the minor, all other consideration is subordinate to this. Therefore, after studying various statues relating to the custody of a child under Hindu Law, Law Commissions Report, and case law it is obvious that all laws are made for the welfare and protection of child's interest. Although there is urgent need to be made clear that court must make some guidelines to implement the concept of the best interest of the child. It is also necessary that the interest of children must not be limited to their material need but has to be quite comprehensive one, taking into its stride social moral, aesthetic, and psycho-analytical norms pertaining to them. This

doctrine should get reflected in all walks of life, especially in the case of gender justice and welfare of the female child to usher in the welfare of the society as a whole. The law Commission of India reflected that mother should have same and equal right vis-à-vis father.

From the above discussion it is summed up that the statuary provisions are hesitant to confer the absolute right of custody to the mother love and affection as well as the care for health of the child is better rendered by the mother though the father can provide better direction so as to the course of education except in exceptional circumstances. So it is judiciary who should have to play the role of a realist judge. Thus welfare theory seems to be the dominant factor in ascertaining the interest of a child in the arena of modern welfare society. Indian courts have made the principle of best interest as the rule of court and try to follow it as efficiently a possible, but the concept itself being a relative one, it leaves as lot of scope for its misuse. The interest of a child cannot be crystallized in concrete terms, so the welfare of children gets glossed over which needs to be arrested, order to achieve the welfare of child in letter and spirit.

While analyzing issue relating to the child custody, it is believed that the Tender Years principle, the current Best Interest legal test, and the Primary Care giver presumption are all flawed. They need to be replaced with a shared parenting approach. The Best Interest test clearly created an environment where judges in general operate with a clear presumption in favor of the mother. In order to overcome that presumption fathers are given the burden of proving the mother is an unfit mother before custody can be awarded to the father. On the other hand, mothers have no similar burden to prove the father is unfit to deny him custody. It is recommended that this fundamental unfairness can be remedied by making equal shared parenting the rebuttable presumption that drives Best Interest decisions. The starting point of all custody cases should be a presumption of equal shared parenting, unless either parent can successful meet the burden of proving otherwise.

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Chapter-V

Protection of Economic/Educational Rights of Children

CHAPTER –V

PROTECTION OF ECONOMIC/EDUCATIONAL RIGHTS OF CHILDREN

INTRODUCTION

Social economic protection of the child's right is the one of the main important consideration of the Courts while awarding the custody of the minor children to the parties so, we have study the protection of minor rights under the following heads namely Guardian and Wards Act 1890, Hindu Minority and Guardianship Act 1956, Prohibition of Child Marriage Act 2006 and protection Under Non Residential Laws (NRI).

(A) PROTECTION UNDER GUARDIAN AND WARDS ACT (GW) 1890 AND HINDU MINORITY AND GUARDIANSHIP (HMG) ACT 1956

The principles of law in relation to the custody of a minor child are well settled. It is established that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of child contained in either the Guardians and Wards Act, 1980 or the Hindu Minority and Guardianship Act, 1956 also hold out the welfare of the child are predominant consideration. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. The question of welfare or protection of social/economic rights of the minor child has to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the

question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the protection of social economic rights of the child as the paramount consideration.

S. Thirumavalavan vs Natarajan.[1] Where the respondent filed a petition for appointing him as guardian of the minor girl who was six years old under Section 25 of the Guardians and Wards Act, 1890. In this case respondent was married with deceased on 13.9.81. The minor girl Rajeswari was born out of the wedlock on 22.6.1982. After the death of his wife, the petitioner and his wife were living with the respondent for some time. After sometime, the respondent took away the minor child. Even though he filed a criminal case before the Chief Judicial Magistrate, Tiruchirapalli under Section 98 of Criminal Procedure Code, he could not succeed. Hence, he has filed this petition.

On the other hand appellant's contentions were that the respondent never cared the minor or his wife. On account of his cruel treatment, the mother of the minor child set fire to herself and committed suicide. Before her death, she has also left a letter blaming the respondent indicating that the properties belonging to her must go to her brother. The appellant was in custody of the minor child. The child was forcibly removed from the custody of the appellant. As the respondent was having illicit intimacy with a house servant, he should not be entrusted with the custody of the child. The respondent was also arranging to have a second marriage.

On the basis of above facts District Judge, Tiruchirapalli, passed an order directing the custody of the minor child to the respondent, rejecting the various allegations against the respondent, hence, the grand-father appellant as filed this appeal. The question before the court in this appeal was whether the minor girl should be entrusted to the custody of the father at this stage?

After analyzing the facts and circumstance of the case the Madras High Court observed that father is not entitled for the girl who is now 16 years of age. The Court further observed that "The said letter deserves to be treated as a testament. She has signed four times immediately after the completion of the sentence in the letter. That itself is an indication that she wanted that letter to be accepted and acted upon and dispel any doubt about its genuineness. In my view, if anything is done contrary to the last wishes of the deceased, we will fail to satisfy the desires of a departed soul. In such circumstances, we should not harp upon the legal rights conferred upon the father and ignore the sentiments expressed by the mother that too at the time of her suicide. When we consider the welfare of the child also, a female child in the custody of a grand-father or mother would feel better and happier than to in the custody of a step-mother. The High court held that "we come across a case like this, we must take note of the traditional proverbial treatment of a step-mother and as far as possible, the court must stretch its arms to prevent the chances for such a treatment/As otherwise, even from the childhood the minor child will begin to experience a frustration and nurture a hatred towards the step-mother and to some extent towards the father, who usually ignores the cry of a minor child for fair treatment at the influence of his second wife. In this case, the respondent has admitted that he has taken a second wife, Further, it is also stated that the second wife has also conceived."

The Court further observed that "It is true that the aforesaid opinion need not be the same in all the cases of an unfortunate/female minor child. But in this case, the father's conduct is unappreciable as per the certificate given by his deceased wife. There is also no evidence to show that the grand-father is not in a position to take care of the minor child and bring her up in the way in which he deserves according to her status. There are statements in the counter and the same is spoken to by the appellant that the respondent was always in financial difficulties and hard pressed for money. But on the other hand, in the petition of the respondent, there is no whisper about any financial difficulty faced by the appellant. As we have seen already, the minor child is all along in the care and custody of the appellant. She has attained the age of 16. In another two years time,

she will be able to decide about her future by herself. In such situation, the court held that the interest of the minor will be better served if the custody is transferred to the respondent. Hence the status quo should be maintained for another few years to come. The lower court is not justified in giving due regard to the last wishes of the mother. The reason for rejecting the said document is flimsy and unjustified. *Sardar Bhupendra Singh vs Smt. Jasbir Kour*[2]

In this case respondent was married with the petitioner on 18-9-85 and three issues were born out of the wedlock i.e. two sons - Manpreet Singh and Tajinder Singh and one daughter namely Ku. Tanvi, Sardar Bhupendra Singh had filed a petition for divorce under Section 13 of the Hindu Marriage Act on the ground that respondent-wife was Involved in the conspiracy to commit the murder of the father of the petitioner. Petitioner was also allegedly insulted by the respondent leveling a charge against him of being incapable to satisfy her sexual desire. The respondent-wife however denied the allegations and made counter-allegations against the petitioner-husband that she was forced by him to live in her parental house.

In this case filed an application filed under Section 26 of the Hindu Marriage Act 1955 for a direction regarding the custody of two sons - Manpreet Singh aged about 11 years and Tejinder Singh aged about 7 years. It was alleged in the application that daughter-Tanvee is living with respondent - mother and the sons Manpreet Singh and Tejinder Singh are in the custody of petitioner-father. It was also alleged in the application that petitioner Bhupendra Singh is not able to look-after the children and both the sons have been deprived of the parental love and affection by the act of the husband/petitioner. Son Manpreet Singh has been kept in hostel and is studying in Christ Church Higher Secondary School at Jabalpur, It is also alleged that petitioner husband is showing apathy towards his sons. Younger son - Tejlnder Singh is living at Burhanpur with the sister of petitioner/husband and taking his education at Burhanpur itself. Thus both the sons are deprived of parental love and care which a basic requirement in such a tender age is. It is further alleged that as the petitioner/husband is not willing to keep the children with him, and for this reason only son Tejlnder Singh has been sent to his

sister's place at Burhanpur. It is also one of the allegations that petitioner/husband does not permit the respondent-mother of the children to meet them. The sons, both Manpreet Singh and Tejinder Singh are alleged to be under the constant threat. When mother/respondent contacted her son, he was taken out from that school and was sent to Burhanpur. Both the sons are not allowed to meet their mother/the respondent.

Petitioner on the other hand husband has denied the allegations levelled by respondent/wife, and contended that she was not capable of looking-after the interest of the children and keeping in view the welfare of the children he has got them admitted in different schools at Burhanpur and Jabalpur, and they are taking proper education. It is also alleged by the petitioner/husband that respondent/wife was not in a position to maintain both the sons as she herself had filed an application claiming maintenance under Section 24 of the Hindu Marriage Act. As per the petitioner, he meets his sons from time to time and takes them to Khandwa on holidays. It has been submitted that minor children could remain only in the custody of natural father and not in the custody of mother.

The trial Court by the impugned order dated 21-9-98 has directed that since the husband was not keeping his both sons with him, they could be properly looked-after, in the circumstances, by the mother and thus custody of both the sons was ordered to be handed-over to mother. However, It was ordered that since both the sons were taking education at Jabalpur and Burhanpur, they should be transferred to mother's custody only after completion of academic session and the mother shall make arrangement for their proper education. It was also observed in the order of the trial Court that it would be open for the husband-Bhupender Singh to meet the sons as well as daughter who is already residing with her mother, Husband was also allowed to take his children to Khandwa at the time festivals and other school holidays. Expenditure to be incurred in the education of the children has also been ordered to be borne by the present petitioner, the father of the children. In this case the question before the Court whether the husband is entitled of his minor children on the basis of financial status is better than wife.

The Court observed that "A rigid insistence of Section 6(a) is not warranted in the circumstances adumbrated in the case. Section 13 of the Hindu Minority and Guardianship Act has to be read in context with section 6(a) of the Act and thus the financial status of the father should not come in the way in the instant case. There are certain letters written by son Manpreet Singh to his mother wherein he expressed that he is feeling lonely and no body was available to reside with him. He also expressed that he wanted to reside at Amravati, with his mother and sister Tanvee". The Court further observed that "under Section 26 of the Act order could not be passed in proceedings under the Guardians and Ward Act. A bare reading of Section 26 of the Hindu Marriage Act envisages that in the matrimonial dispute welfare of the child should be of paramount consideration for both the quarrelling mother and father who are at loggerheads. Their interest cannot be allowed to suffer in the matrimonial proceedings of divorce/ any other proceedings under the Hindu Marriage Act 1955. Since the trial Court has observed that it shall be the duty of the mother to see that education of the children should not suffer and both the sons and daughter Tanvee shall be allowed to reside with the father during school holidays, festivals etc. It has been further observed that it shall be the duty of the father to send them back immediately after the holidays are over. It was further mentioned that it shall be the duty of father to bear the expenses of the education etc. and in the result, the trial court is directed to pass an appropriate order forthwith after herein the parties." The Court held that Since the current academic session is coming to an end, the present order shall be implemented after the current academic session is over and both the sons Manpreet Singh and Tejinder Singh can appear In the ensuing examination from the schools where they are studying at present. Trial court is further directed to decide within three months from today after hearing both the parties about the quantum of expenditure to be paid by the petitioner towards both the sons for their education. Petitioner is however entitled to keep the children with him during vacation and then to send them to mother. It is expected from the trial Court to see that the order is not violated. Arrangements should be made by the trial court so that children have the sense of feeling of his father also. In this case the Court protect the child's

economic interest and award the custody to the mother and visitation rights given to the father.

Surabhai Ravikumar Minawala vs State Of Gujarat[3]

This petition is filed under the provisions of Article 226 of the Constitution of India praying this Court for issuance writ of habeas corpus. Petitioner is the mother of a child named Kiran aged about 9 months. It is her say that she has married to respondent no. 2 on 28th December, 2002 and during their wedlock child Kiran was born on 12th November, 2003. It is averred by the petitioner that after the child was born within short time she was driven out of the house by respondent no. 2 and his family members. Thereafter she made efforts to get the custody of the child but in vain. After all efforts having failed, now she has been constrained to approach this Court as a last resort. It is further averred in the petition that since the child is aged about 9 months, she is natural guardian of the child. She has for that purpose placed reliance on the provisions of section 6 of the Hindu Minority and Guardianship Act, 1956. In the end she has prayed that appropriate writ of habeas corpus be issued against respondent no. 2 to produce the minor child Kiran before this Court and direct him to hand-over the custody of the child to her.

While on the other hand the respondent filing affidavit-in-reply wherein it is stated that the present petition is not maintainable since alternative efficacious remedy is available to the petitioner. It is further averred that there is no need to issue writ of habeas corpus since the child is not in illegal custody of the father and the welfare of the child would be maintained in the best possible manner, if the child remained with respondent no. 2 and his family. It is also averred that it is the petitioner who has left the family with her father and brother and she is not prepared to come back to family of respondent no. 2. It is, therefore, prayed that the petition be dismissed.

Now the question before the court with regard to the protection of social economic interest of the minor is required to be considered. It is stated by the respondent no. 2 in his affidavit-in-reply that his family is having good reputation.

They have an established business of jewellery over 100 years. The family comprises parents and sisters and brother of respondent no. 2, who can look after the child. Since they are financially very well-off, they can secure good education for the child and provide all facilities. If the claim of respondent no. 2 is to be weighed vis. is the claim of the petitioner regarding safeguarding the interest of the child, it is very clear that petitioner also can provide all the basic, necessary facilities and amenities to the child. It is to be seen here that respondent no. 2 is a businessman and it transpires from the affidavit that the child is likely to be with its grand mother and paternal aunts. Between the mother on the one side and grandmother and paternal aunts on the other, undoubtedly the scale would tilt heavily in favor of the mother. After hearing both the parties claims the court observed that we had with the petitioner, it appears to us that she is well educated, her parents' family stays in Bombay, which is centre of education and even from the point of view of the health of the child, best of the medical facility can be had in that city and when needed petitioner can secure it for her child as could be seen from the medical certificate and other papers she had shown to us. These aspects cannot be ignored by us to decide even prima-facie the issue with regard to welfare of the child and who will be in a better position to take care of it. As stated above, our answer is obviously in favor of the petitioner.

The legislature in its wisdom has thought it fit the mother ordinarily have custody of the child if it is below the age of five years. There is nothing extraordinary in this case which may prompt us to deviate from the above statutory provision. Merely because father of the child i.e. respondent no. 2 is in better financial position than the mother, it does not mean that the child's interest will best be served if it remained with father and his family. No amount of wealth and 'mother like love' can take the place of mother's care and love for the child. When she is in a position to provide basic necessities and amenities to the child for its comfort and good upbringing, luxuries spoken of in the affidavit of respondent no. 2 cannot persuade us to deprive the mother of her child and allow the custody of the child to remain with him. In our opinion, she will be in a better position to discharge parental obligation.

The court of further observed that "we may deal with the alternative submission of Mr. Nanavati that in the event of our holding in favour of the petitioner, direction may be given that for 15 days in a month the custody of the child be given to respondent no. 2 who will go to Bombay and bring the child at his own expense. It is also submitted that during Ganesh Utsav, which is presently going on, the custody of the child be given to respondent no. 2 for a period of 15 days. This submission has been opposed by Mr. Naik, as in his submission, that may create complications and the child will be shunted between the two families every 15 days. The decision relied on by Mr. Nanavati for this purpose is in the case of Poonam Datta and it is distinguished by Mr. Naik by saying that if the father so desired he could come to Bombay and meet the child, so also the other family members, because unlike the case before the Apex Court where it was aged grand parent, these persons are in the position to go to Bombay and meet the child. We are afraid that we cannot accept the alternative submission of Mr. Nanavati, but we find some substance in the submission or Mr. Naik because such a direction would unnecessarily toss the child like shuttlecock between the two families that would adversely affect health of the child at this tender age and mentally also it will not able to adjust in either of the families. In this very decision it has been laid down by the Apex Court that parties should refrain from doing anything which may adversely affect the child physically or mentally."

Prakash Chandra Jain vs Smt. Chandrawati Jain[4] in this case the Court has observed regarding the question of the welfare and social/economic protection of the minor child is to be considered in the background of relevant facts and circumstances. Each case has to be decided on its own facts. It is no doubt, true that the father is presumed by the statues to be better suited to look after the welfare of the child, but court has to see that who have better financial resources of either of the parent or their love for the child may be one of the relevant consideration but cannot be the sole determining factor for the custody of the child. It is here a heavy duty is cast on the court to exercise its judicial discretion judiciously in the back ground of all the relevant facts and circumstances bearing in mind. The father has generally a legal right to control and direct the education

and bringing up of his male child till he attains majority and the court generally does not interfere with the father right in exercise of his paternal authority except:

- Where by his gross moral turpitude or rowdy behavior he forfeits his rights;
- Where he has by his conduct abdicated his paternal authority and, where he seeks to remove his children wards of court out of the jurisdiction without consent of the court. Conduct of parents and wishes of both the parents are matters of primary consideration for the court in deciding the question of custody or access and where the child has been living with his maternal relation and the father had not since then even seen him and almost estrange himself and there is no other competent female relation living with the father entitled to take care of the child. While on other hand, the maternal relations had strong affection for the child, the custody of the child is apt to be refused to the father in view of the minor welfare which is primary consideration; sometimes the court has subordinated the father's claim to that of the maternal relations including the mother.

In *Mala Kala Ramu vs Mammadi Gopalamusty*[5] where mother had died by burn injuries under mysterious circumstances and criminal cases were filed against his husband and his mother. The husband who has remarried also failed to pay any maintenance to the children who were staying with the maternal grandfather. The court granted custody to the father as against the grandfather with whom the children were staying for seven years.

The Allahabad High Court after studying the cases cited by both the parties observed that "even where mother had died in mysterious circumstances the court has invariably preferred to give custody to the father as against the maternal grandparents while in the facts of circumstances of the cases these could have been the ideal orders in the interest of the children yet there is need to be sensitive to the emotional trauma the uprooting of child from one place to another may cause. It is important also to reflect on the long term implications of such orders or the minds of the children, who as they grew up might suffer. Besides, husbands (fathers) who

have harassed their wives (mothers) and killed or driven them to death should not get a message that they will not lose the custody over their children. Strong probability of losing child custody could act as deterrent to husbands victimizing their wives. These considerations just by way of abduction caution, with the paramount consideration being the welfare of the child in all respects".

In *Chandrakala Menon (Mrs.) vs Vipin Menon*[6], the Hon'ble Supreme Court held that the question regarding the custody of a minor child cannot be decided on the basis of legal rights of the parties. The custody of a child has to be decided on the sole and predominant criterion of what would be best serve the interest and welfare of the minor. In that case also the girl Sumaya appeared in the chambers and her wishes and sentiments were gathered by Hon'ble Supreme Court. She liked her maternal grandparents and the court came to the conclusion that it would be in the interest and welfare of the minor that she would be permitted to be in the custody of her mother Chandra Kala. The custody of the father was refused.

In *Sheila B. Das vs P.R. Sugasree*[7], B.P. Singh and Altamas Kabir, J.J, the instant appeal filled by the appellant (mother) against the judgment and order of Kerela High Court. Here the appellant was a doctor by profession and respondent was a lawyer by profession. They have married and girl child, Ritwika, was born on the 20th June 1993. After sometime the relationship gets strained and the appellant left her matrimonial home along with her child. This application filed under Section 7 and 25 of Guardian and Wards Act, 1890 and under Section 6 of Hindu Minority and Guardianship Act, 1956.

The High Court allowed the applications of the respondent and gave the custody of the child to the respondent (father). Being dissatisfied with the order of the family court, the appellant herein filed an appeal in the High Court of Kerela wherein an order of the family court was stayed. The respondent thereupon filed an application before the High Court for review of the said order and in the pending proceedings a direction was given by the High Court to the family court to interview the minor child. The report of the family court shows that the minor

child preferred to stay with her father and ultimately High Court vacated the stay granted by it on 21st May, 2001. The High Court confirmed the order of the family court and given the custody to the father. High Court, however, permitted the mother to visit the child at the house of the father once in a month and with the direction that she will not be removed the child from the father's house.

Being aggrieved by the order of the High Court the mother/ respondent file appeal before the Supreme Court. Appellant citied various case law in support of her arguments i.e. *Hoshie Shavaksha Dolikuka vs Thirty Hosie Dalikuka.*[8] *Saras Watibai Shripad Ved vs Shri Pad Vasanji Ved*[9], *Rosy Jacob vs Jacob A. Chakrama Khal.*[10]

The Supreme Court dissented from all the above judgment and the court observed that in the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the courts, keeping in view the fact that paramount consideration in such cases was the interest and well being of the minor. In this case the Supreme Court further observed that "there is no reason to consider the respondent ineligible to look after the minor. In fact after having obtained custody of the minor child, the respondent does not appear to have neglected the minor or to look after all her needs the child appears to be happy in the respondents company and has also been doing consistently well in school. The respondent appears to be financially stable and is not also disqualified in any way from being the guardian of the minor child". No allegations other than his purported apathy towards the minor, has been leveled against the respondent by the appellant. Such allegations are not borne out from the materials before the court and are not sufficient to make the respondent ineligible to act as the guardian of the minor.

Therefore, the custody of the child has given to the father (Respondent) and visitation rights given to the mother. Therefore the appeal dispose of by retaining the order passed by the learned judge of the family court at the issue on the application of respondent under Sections 7 and 25 of the Guardian and Wards Act 1956.

(B) PROTECTION UNDER PROHIBITION OF CHILD MARRIAGE (PCM) ACT 2006

Prohibition of Child Marriage Act has been passed in the year of 2006 for protection of social interest of minor by eradicating the child's marriage menace from the society. Since, the Child Marriage is a violation of Human Right and effect of the social status of minor. The aim and object of the Prohibition of Child Marriage Act 2006, is to protect the minor children from early marriages. This legislation remains the law on child marriages in India and giving important rights to victims of child marriage and children born from these marriages. The Act brings about far reaching changes in the law and settles the most controversial issues regarding the legitimacy of the children born out of such wedlock and the custody of such children. Thus the children born out of the wedlock would be legitimate and their custody shall be decided keeping in mind their best interest and welfare.

Section 5 of Prohibition of Child Marriage Act, 2006 clearly makes provision for the custody of children born of the child marriage and read as under:

'(1) Where there are children born of the child marriage, the district court shall make maintenance an appropriate order for the custody of such children. (2) While making an order for the custody of a child under this Section, the welfare and best interests of the child shall be the paramount consideration to, be given by the district court. (3) An order for custody of a child may also include appropriate directions for giving to the other party access to the child in such a manner as may best serve the interests of the child, and such other orders as the district court may, in the interest of the child, deem proper. (4) The district court may also make an appropriate order for providing maintenance to the child by a party to the marriage or their parents or guardians.'

Likewise Section 6 of Prohibition of Child Marriage Act, 2006 talk about the legality of children born of such marriage that irrespective of the fact child marriage has been annulled by a decree of nullity under Section 3, every child begotten or conceived of such marriage before the decree is made, whether born

before or after the commencement of this Act, shall be deemed to be a legitimate child for all purposes. This Act impliedly repeals the section 6(c) of Hindu Minority and Guardianship Act 1956. Therefore, after passing the Prohibition of Child Marriage Act 2006 the husband is not entitling for the custody of minor married girl.

Thus there is truth behind the fact that no matter how many amendments are made in the law, it can only be effective if it is enforced in its true spirit. So, even if the suggestions are considered, we must put our faith in the judiciary and the government to implement them and put an end to this disastrous tradition. With the amendment in the law and its due application it is hoped that we shall at last be able to free our society of the demon called child marriage. Similarly, judicial attitude towards the protection of social of the minor married girl after 2006 also reflects that the judiciary dissented to give custody to the husband keeping in view the social interest or right of the minor girl. In *Association for Social Justice & Research vs Union of India & others*[11] also took note of this menace, inter alia, pointing out as under:-

Sociologists even argue that for variety of reasons, child marriages are prevalent in many parts of this country and the reality is more complex than what it seems to be. The surprising thing is that almost all communities where this practice is prevalent are well aware of the fact that marrying child is illegal, nay; it is even punishable under the law. NGOs as well as the Government agencies have been working for decades to root out this evil. Yet, the reality is that the evil continues to survive. Again, sociologists attribute this phenomenon of child marriage to a variety of reasons.

The foremost amongst these reasons are poverty, culture, tradition and values based on patriarchal norms. Other reasons are: low-level of education of girls, lower status given to the girls and considering them as financial burden and social customs and traditions. In many cases, the mixture of these causes results in the imprisonment of children in marriage without their consent. The present case is a telling example, which proves the sociologists correct. In a recent case judiciary

try to settle the issues of minor wife custody by its ruling on 7th October 2011 in T. Shive Kumar's case[12] where the Madras High Court in a writ petition held that marriage of a girl below the age of 18-years is voidable and will subsist until it is annulled by a court under the Prohibition of Child Marriage (PCM) Act 2006.

'Such a marriage is not a valid marriage in the strict sense but it is not invalid', a full Bench comprising Justices K N Basha, T Sudanthiram and S Nagamuthu said, an adult male in a child marriage would not be the natural guardian of the minor girl. As per provision 6(c) of Hindu Minority and Guardianship, the husband of a minor girl was the natural guardian and this provision, however, stood repealed by the Prohibition of Child Marriage Act, the Bench said.

The father of a minor girl had filed a Habeas Corpus Petition (HCP) seeking a direction to the Tiruvallur Town police to secure his 17 years old daughter from the illegal custody of a person and hand the girl over to him. When the matter had come up before a Division Bench earlier, the girl in an affidavit said that she was in love with the man and had married him in July this year. After hearing rival submissions, the Bench directed the girl be kept in a children's home run by the government and referred the matter to a full bench to decide whether the marriage of a minor girl could be said to be valid and the custody of the girl be given to her husband.

The Division Bench had also sought a ruling from the Full Bench whether a minor could be said to have attained the age of discretion and thereby walk away from lawful guardianship of her parents.

The Full Bench held that as per the Hindu Minority and Guardianship Act, the husband would not acquire the status of natural guardian of the girl at all. The Judges said that though such a voidable marriage subsisted, until it was either accepted expressly or impliedly by the girl after attaining the eligible age or annulled by a court of law, such marriage could not be equated to a "valid marriage."

The Bench said since the parties in the case were Hindus, the man who married a minor would not be entitled to her custody even if she expressed her desire to stay with him. However, in the interest of the girl's welfare, he may move the court to set her at liberty if she was being illegally detained by anybody. In a HCP, while granting custody of a minor girl, the court should consider the paramount welfare, including the girl's safety, notwithstanding the legal right of those, who sought her custody, the Judges said. A minor girl could not be allowed to walk away from her parents. But if she expressed her desire not to go with them, the court could not compel her, provided, in the court's opinion, she had the capacity to determine the path she wanted to follow, the bench said. Instead, it may order that she be kept in a home for minors under the Juvenile Justice (Care and Protection) Act. While sending back the case to the Division Bench for disposal, the Judges said adequate publicity should be given for Prohibition of Child Marriage Act. The government should instruct educational institutions to counsel students in their teens and parents on the ill-effects of child marriages.

(C) PROTECTION UNDER NON RESIDENT INDIANS (NRI) LAWS

As we know that India is not a signatory of Hague Convention of 1980. There is no denying that a parent's act of unilaterally uprooting a child from her habitual residence and thereby preventing her access to the other parent can prove to be a traumatic experience for the child, with potentially deleterious effects on her psychological and sociological well-being. While the doctrine of "welfare of the child" is long-settled in Indian jurisprudence and has been actively applied and evolved in various cases by the Indian courts, there is no domestic legislative framework dealing specifically with parental child abduction. In India, parental child abduction, that is, the removal of a child from the matrimonial home by one of its parents without the consent of the other parent and without any custody order made by an Indian court is not recognized as a crime. By extension, international parental child abduction or the removal of a child by its parent to or outside of India is also not a statutorily defined crime within India.

In the absence of any domestic laws, together with the non-ratification of the Convention, Indian courts have dealt with cases of parental child abduction as civil custodial disputes. Typically, such cases have been instituted in the courts either by way of writ petitions in the nature of habeas corpus under Article 32 (before the Supreme Court) or Article 226 (before a high court) of the Constitution, or, as applications for custody under the Guardians and Wards Act, 1890. Once seized of the matter, the court invokes the doctrine of parens patriae (Latin for 'parent in nation') so as to employ the principle of "welfare of the child" which is equivalent to the concept of "best interests of the child" endorsed in most common law jurisdictions and in the Convention. However, given the complete lack of a legislative framework in the context of parental child abduction, the courts exercise very wide discretion in applying the 'welfare' doctrine to the particular fact situations. So, we have look forward the judiciary to find out the judicial attitude regarding the social economic rights of minor`s children.

The Supreme Court upholding the decision of the High Court in *Kumar Jahgirdar vs Chethana Ramatheertha*[13] in this case the Supreme Court had considered very vexed question regarding the effect of second marriage of mother on the custody of children the Supreme Court came to the conclusion that a female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification in safeguarding interest of the child. The brief fact of the case are the wife after obtaining divorce on the mutual consent, the wife remarried to Mr Anill kumble a cricketer of National and International repute. The family Court of Banglore by judgment directed the custody of the child to the father and given the visitations rights to the mother but the High Court taken a different view and reversed the judgment of family Court the high Court directed that the mother should continue to retain exclusive custody of the child with visitation right to her former husband. The High Court concluded that in the absence of any compelling or adverse circumstances, the natural mother cannot be deprived of the exclusive custody of a growing female child, the High Court further observed that female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a

disqualification for it. The conclusion of the High Court aggrieved by the order of the High Court, the former husband applied before the Supreme Court. The Supreme Court observed that the conclusion of the High Court seems to be just and proper in safeguarding the interest of the child.

In *Radha @ Parimala vs N. Rangappa*[14], in this case the mother filed a petition for custody of the child. The respondent who is the father of the minor under section25 of the Guardian and Wards Act1890 alleging that he married the appellant at Kengapura village prevailing in the community from out of the wedlock the minor was born. The appellant (mother) left the matrimonial home without any justification and consent of the respondent and in his absence and without informing anyone else. Surprised by the sudden disappearance of the appellant from the matrimonial house, the respondent (father), the parents of the appellant and well-wisher of the respondent went in search of the appellant. They found the appellant in the company of her paramour one P. Ismail by name, who is an assistant master at Honganur in Channapatna Taluk living in adultery with him. Under the circumstances the respondent filed a case against his wife under section 13(i) of the Hindu Marriage Act for divorce. The appellant despite service of notice on her did not appear before the Court. In the circumstances the court granted decree of divorce on the basis of the evidence adduced by the respondent. However after the disposal of respondent petition, the appellant has filed an application for setting aside the ex party decree. The Court below has given the custody of the minor to the father. Aggrieved by this order the mother appealed before the High Court. The Karnataka High Court after hearing both parties councils and evidence on record observed that "it is the prime duty of the Court to do all the acts and things necessary for the protection/welfare of minors for they cannot take care of themselves. The expression 'welfare' in this context is to be understood in its widest sense and embraces not merely the martial and physical well-being and happiness of the minor but every circumstance and every factor bearing upon the moral/and religious welfare and the education and upbringing of the minor. In all matters relating to the custody and upbringing of the minor the primary and paramount consideration of the court must be the welfare of the

minor. The word welfare of the child admits of no strait-jacket yard tick. It has many facets such as financial, educational, physical, moral and religious welfare. The question where the welfare of the minor lies should be answered after weighing and balancing all factors germane to the decision making, such as relationships, claims and wishes of parents, risk, choices and all other relevant circumstances. The answer lies in the balancing of these factors circumstances and determining what is best for the minor total well-being''. The court further observed that the natural Guardian is entitled to have the custody of the minor child. Hence, the father as a natural guardian is entitled to the custody of the minor children though, in the case of girl, less than 5 years the mother has the right to custody of the minor by a reason of the proviso. Subject to the exception made in the proviso to clause (a) of section6 the father has the preferential right of guardianship and custody of the minor children. But, it should be remembered that even the preferential right of the father as natural guardian should be subordinated to and even overridden by the sole consideration that the welfare of the minor is to be determinative, factor in all these matters of guardianship and custody. However, the controlling consideration governing the custody of minor children is the welfare of the children and not the right of the parties. The father right to the custody of the minor children is neither an absolute nor an indefeasible one. The welfare of the child should be the paramount consideration. The mother can also be given the custody of the minors, if their welfare or interest should require it, even if the father is otherwise fit to act as guardian. In entrusting the custody of the minor child to one of the parents, the Court should take into account or relevant circumstances including social and religious environment of the family, the quality of immediate neighborhood and locality in which a particular parent resides, the financial position of the parties, education facilities for the minor concerned and all other circumstances and factors which are germane to the decision making. The Court is not so much concerned with the feeling of a particular parent as with the welfare of the minor. The High Court relied on *Smt.Mohni vs Virender Kumar, and Vegesina Venkata Narasaiah vs Chintalapati Peddi Raju (DB),*[15] *Sunil Kumar Chowdhary and Anr. vs Smt. Satirani Chowdhary.*

Therefore, from an overall reading of the above matters decided by different Indian Courts, it may be said that irrespective of any Foreign Court custody order, Indian Courts generally adjudicate matters of child removal by considering the best interest of the child as a paramount consideration for settling such issues.

It is in this context that the brief analysis of the Ruchi Majoo case examines and how far the Court's exercise of its wide discretion is effective in safeguarding the child's interests in the absence of any formal laws and rights.

The *Ruchi Majoo*[16] case concerned an NRI couple that was settled in the U.S.A. The appellant-wife left the U.S.A. to return to India with their son. Meanwhile, her estranged husband filed a suit in an American court claiming that his wife had abducted the child. The American court issued a 'red corner notice' against the wife and directed her to return with the child to the U.S.A. The appellant-wife in India moved the Guardian Court at Delhi, by way of an application under the GAWA, seeking the right of custody of her son. The court allowed her petition and granted her custody. The respondent-husband appealed this custody order before the Delhi High Court. The Delhi High Court allowed the appeal and set aside the lower court's custody order on the basis that the Delhi court had no jurisdiction in the matter since the parents and the child were American citizens and the child was not 'ordinarily resident' in India, as is requisite under Guardians and Wards Act, 1890, for an Indian court to grant a custody order. The High Court further held that since an American court had already issued an order in the matter, all issues relating to custody needed to be agitated before the appropriate courts in the U.S.A. On appeal, the Supreme Court set aside the judgment of the Delhi High Court, holding inter alia that the Guardian Court in Delhi had the jurisdiction and competence to determine custody in this matter. It further ordered interim custody of the child with the appellant-mother during the pendency of the proceedings before the Delhi Guardian Court, and also ordered visitation rights in favor of the respondent-father.

In arriving at its decision, the Supreme Court culled out three questions for determination:

(i) Whether the high court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same;

(ii) Whether the high court was right in declining the exercise of jurisdiction on the principle of comity of courts; and

(iii) Whether, the order granting interim custody to the mother of the minor calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

1. On the question of Jurisdiction of Courts the Court observed that in affirming the jurisdiction of the Delhi Court to entertain the petition for the guardianship or custody of the minor child, the Court construed the term 'ordinarily resides' as provided under Section 9 of the Guardians and Wards Act, 1890. Section 9(1) states that "Court having jurisdiction to entertain application – (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having Jurisdiction in the place where the minor ordinarily resides."(Emphasis supplied)

The Court held that that in law as well as in the instant facts, the question as to whether one is ordinarily resident in a place depends not only on the simple fact of residence but also on the intention to make that place one's ordinary abode or place of habitual residence. The court noted that the child was studying and residing in Delhi for the past three years and that the mother intended to pursue her profession in Delhi. E-mails produced by her as evidence indicated that the father of the child was a party to this arrangement. On these facts, the Court concluded that the child was 'ordinarily resident' in Delhi such that the Guardian judge in Delhi had the jurisdiction and competence to decide the custody rights. In respect of the law, the Court placed reliance on various decisions to support its purposive interpretation of the rule under Section 9 of the GAWA. The Court's interpretation of 'ordinary residence' by delving into the factual background merits a more detailed analysis in terms of the principles of statutory interpretation, which this article will not undertake.

What is clear though, in my opinion, is that even when confronted with the 'threshold' of preliminary legal argument of jurisdiction as statutorily provided for under the GAWA, the Court, by conducting a detailed enquiry and taking the entire factual context into account, was working within the framework of the 'welfare doctrine'

2. In answering the second question, the Court explicitly invoked the doctrine of "welfare of the child" to hold that the jurisdiction of an Indian court cannot be declined solely on the basis of the principle of "comity of courts". The Court, speaking through Justice T.S. Thakur, observed:

"Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, Courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Criminal Procedure, 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its parent's patriae jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision."

The Court's decision in Majoo clearly evinces a breakaway from the stricter adherence to jurisdiction as laid down by the Supreme Court in its earlier decision in *Srimati Surinder Kaur Sandhu vs Harbax Singh Sandhu and Another.*[17] The point to note is that in both these cases the legal issue of jurisdiction (in relation to

the principle of judicial comity) is contextualized by invoking the 'welfare doctrine', albeit with contrasting results.

3. The third question before the court was relating to the visitation rights of the father. The court observed that the minor has been thoroughly antagonized against the respondent father and granted visitation rights to the father. Thus it is submitted that interest of the child should be protected by the courts in a way that enables a clear recognition of the rights of the child. This can be achieved only to emotive a domestic frame work of laws dealing with the issues of child custody in NIR case.

CONCLUSION

After analyzing the position under Guardian and Wards Act 1890, Hindu Minority and Guardianship Act 1956, Prohibition of Child Marriage Act 2006 and Position of Non-residential Indian's regarding the economic and educational protection of child's rights the researcher submits that minor's economic and educational interest / rights are protected by the legislative laws. The researcher further submits that judicial attitude also reflects that while awarding the custody of the minor to the parties the court must weight to the protection of educational as well as economic interest of the child. All other considerations are subordinated to the minor's social / economic and educational rights.

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Chapter-VI

Custody of Children: Non Residential Indian's-Some Legal Issues

CHAPTER –VI

CUSTODY OF CHILDREN: NON RESIDENTIAL INDIAN'S – SOME LEGAL ISSUES

INTRODUCTION

Over the years a large number of Non-resident Indians (NRI) have multiplied in every jurisdiction abroad and so the problems. Non-resident Indians always face the risk that, when their marriage breaks down, one spouse will run to India, often with the parties' child or children, hoping for a better result in the Indian courts than in the foreign courts. Sometimes the children are used as hostage for a better financial settlement. The Abandoned bride in distress due to runaway foreign country resident Indian spouse, stressed non-resident Asian parent frantically searching spouse in India who has removed their child from a foreign jurisdiction in violation of a foreign court order, desperate parent seeking child support and maintenance, non-resident spouse seeking enforcement of foreign divorce decree in India, agitated children of deceased non-resident Indian turning turtle in trying to seek transfer of property in India and its repatriation to foreign shores, anxious and excited foreign adoptive parents desperately trying to resolve Indian legal formalities for adopting a child in India, bewildered officials of a foreign High Commission trying to understand the customary practices of marriage and divorce exclusively saved by Indian legislation, foreign police officials trying to understand intricacies of Indian law in apprehending offenders of law on foreign soil: these are some instances of problems arising every day from cross-border migration. Thus the number of problems is myriad, but the solutions are a few or non-existent.[1] This fact is evident that times have changed but family law legislations enacted by the Indian Parliament in 1955 and 1956 have left family laws for NRIs where they were. This results an influx of family law problems arising out of NRI marriages with no practical solutions in the legislative enactments as they exist today. The pertinent question is whether the existing family Laws protected the socio-economic interest of the NRI children relating to

custody of children in case of description of family/parental relationship? The answer of above posed question is that in India there is no Indian legislation which protects the socio-economic rights of NRI children regarding the custody matter. This is also fact that India is not the signatory to the Hague Convention. Hence the only expeditious an effective remedy in matters of child custody is by invoking of the Writ of *Habeas Corpus* in High Court directly to secure protection of the interest of children. Indian Laws that deals with the custody of children are not too many to name a few.

- The Guardian and wards Act, 1890.[2]
- The Hindu Marriage Act, 1955.[3]
- The Hindu Minority and Guardianship Act, 1956.[4]

A landmark case that decides the same was *Geeta Hari Haran Vs Reserve Bank of India.*[5] The high court by way of the Writ o f Habeas corpus can order custody of minor at the behest of the parent applying for the same with predominant focus placed of the welfare of the child. In *Dhanwati Joshi vs Madhav unde*[6], the Supreme Court referred to the Hague Conventions on the civil Aspect of International Child Abduction. As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the Convention, any child below 16 years who had been "wrongfully" removed or retained in another contracting state, could be returned back to the country from which the child had been removed, by application to a central authority. Under article 16 of the convention, if in the process, the issue goes before a court, the convention prohibits the court from going into the merits of the welfare of the child. Article 12 requires the child to be sent back, but if a period of 1 year has lapsed from the date of removal to the date of commencement of the proceeding before the court, the child would still be returned unless it is demonstrated that the child is now settled in its new environment. Article 12 is subject to Article 13 and a returned could be refused if it would expose the child to physical or psychological harm or otherwise placed the child in an intolerable position or if the child is quite mature and objects to its returned in England these aspects are covered by the Child Abduction and

Custody Act, 1985. So far as the non –convention countries are concerned, where a removal related to a period before adopting a convention, the Law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of foreign court as only a factor to be taken into consideration.

There being no bilateral agreements or treaties with foreign countries, parallel court proceedings initiated on both sides in different countries leads to a conflict of jurisdictions and flouted court orders. The result undoubtedly is a total mess. The sufferers are fellow citizens in India. In this stage and time, the legislature seriously needs to enact a comprehensive legislation which is a composite and wholesome answer to these social issues. Patchwork with isolated eyewash will not help. The need of the hour is a new law.[7]

(A) DEFINITION OF NON-RESIDENT INDIAN

In simple terms, an NRI is a person who is not resident in India. It does not, however, follow that a person's residential status keeps changing whenever he goes abroad and irrespective of the duration of his journey outside India. For a proper appreciation of the term 'NRI', therefore, one has to turn to Section 2(p) of FERA. *Foreign Exchange Regulation Act* defines an NRI as an Indian citizen who stays abroad for employment, business or vacation for any other purpose in circumstances indicating an indefinite period of stay outside India. Other examples of NRI are, Indian citizens working abroad on assignments with foreign Governments/Government agencies or international/regional agencies like the United Nations Organization (UNO) (including its affiliates), the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), the World Health Organization (WHO) etc. Officials of the Central and State Governments and Public Sector Undertakings deputed abroad on temporary posting are also regarded as NRIs.[8]

Thus Indian citizens who proceed abroad for higher studies, short business, visits, training, medical treatment etc. are treated as resident in India even during their temporary absence from the country. NRIs become residents of the country

only when they return to India for permanent stay. They continue to remain NRIs on their visits to the country during vacations. Following are some of the typical instances of the issues that arise in NRI custody matters that have been repeatedly shown up in the actual case studies from different states of the country:

(i) Rights of parents relating to custody.

(ii) Jurisdiction of the court.

(B) DEFINITION OF CHILD REMOVAL

Families with connections to more than one country face unique problems if their relationship breaks down. The human reaction in this already difficult time is often to return to one's family and country of origin with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another may, whether inadvertently or not, be committing child removal or inter parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of the person with whom the child normally lives.[9]

A broader definition encompasses the removal of a child from his / her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction signed at The Hague on October 25, 1980 with 75 contracting countries today as parties from all regions of the globe, however defines removal or detention wrongful in the following words[10] Article 3 provided that: The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Child removal does not find any specific definition in the Indian statute books and since India is not a signatory to the Hague Convention, there is no parallel Indian legislation enacted to give the force of law to the Hague Convention. Hence, in India all interpretations of the concept of child removal are based on judicial innovation in precedents of case law decided by Indian courts in disputes between litigating parents of Indian and / or foreign origin.

(C) INDIA AND HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: (Why India should be interested in Joining the 1980 Convention?)

The Hague Convention on Civil Aspects of International Child Abduction came into force on December 1, 1983 and has now 75 contracting nations to it. The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on Child protection policies in much of the world. The Convention secures the prompt return of children wrongfully removed to or retained in any Contracting State and ensures the rights of custody and access under the laws of such Contracting States. India unfortunately, is not a signatory to the Hague Convention and from practical experience it can be stated that the principles laid down in the Convention are not applicable in India.

In a civilized society where globalization and free interaction is part of a rapidly changing set up, India is emerging as a major destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems on the family law front are largely unresolved. Times have

changed but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India need a workup. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. The above situation promotes and encourages child removal to India by an offending parent and deprives the child's custody rights to be determined by the laws of the country where the child was normally resident. It also diverts the best interest of the child as the litigation in India gets converted into a fight of superior rights of parents whereas the real issue of the welfare of the child becomes subservient and subordinate. Practical experience also shows that foreign courts now largely disallow children from overseas jurisdictions to be brought to India apprehending that children will not be returned to the country of their residence. Instances are abound from US and UK where Non Resident Indian parents desperately seek advice and opinion on what to do as Courts of Law in these jurisdictions deny permission for children to be brought to India in child custody dispute. This perspective of conflict of jurisdictions needs immediate resolution. Therefore, in an international perspective, four major reasons can be identified to establish and support the necessity of India's need to sign the Convention.

(i) India is no longer impervious to international inter parental child removal. In the absence of the Convention principles, the Indian Courts determine the Child's best interest whereby any child removal is dealt with like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The over powering parent wins to establish his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

(ii) Such a determination in India plays into the hands of the abducting parent and usurps the role of the Court which is best placed to determine the long

term interests of the child, namely the Court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of The Hague Convention approach is that it quickly restores the position to what it was before the wrongful removal or retention took place and supports the proper role played by the Court in the country of the child's habitual residence. The correct law to be applied to the child would be of the country of the child's origin and so would be the Court of that country. In India, determination of rights as per Indian law of a foreign child removed to India by an offending parent may often be clouded and may not be in the best interest of the child and ought to be determined by the law and the Court of the child's origin.

(iii) The fact that India is not a party to the Hague Convention may have a negative influence on a foreign judge who is deciding whether a child living with his / her parent in a foreign country should be permitted to spend time in India to enjoy contact with his / her Indian parent and extended family. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign Judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle, membership of the Hague Convention will bring the prospect of achieving the return to India of children who have their homes in India but have been abducted to one of the 75 States that are parties to the Convention.

(iv) The Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in Courts of different countries who are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the Country where the child was habitually resident before removal.

(D) JURISDICTION OF COURTS

Regarding the jurisdiction of courts there are two important conventions relating to Non residential child custody matters. *(a) The European convention, (b) The Hague Convention:*

(a) The European convention:

A European convention on recognition and enforcement of decision concerning custody of children and on the restoration of custody of children was prepared under the auspices of the council of Europe and signed on may 20,1980.The 1985 Act gives effect to the provisions of convention dealing with the recognition and enforcement of decisions. But not those deals with abduction where the provisions of the later Hague Conventions are preferred. If application are made in the English Court under both conventions that under The Hague Conventions is to be dealt with first.[11]

For the purposes of the European Conventions, decision relating to custody is decision of relating judicial and administrative authority in so far as it relates to the care of the person of the child including the right to decide on the place of his residence or to the right of access to him and the child means any person under 16 years of age who has not the right to decide on his own place of residence under the law the law of his habitual residence, the law of his nationality or the internal law of the state addressed.[12] A decision relating to custody of a given contracting state is to be recognized and where is it enforceable in the state of origin made enforceable in the United Kingdom.[13] Where at the time of the removal of the child across an international frontier there is no enforceable decision in a contracting state relating to his custody, the conventions provisions apply to any subsequent decision relating to the custody of the child and declaring the removal to be unlawful given in the contracting state at the request of any interested person.[14]

A foreign decision with in these provision to recognized in England as if made by an English court having jurisdiction to make it, However, the court may application of any person appearing to it to have an interest in the matter, declare

on any of the grounds specified in article 9 or 10 of the convention, that the decision is not to be recognized in the United Kingdom. Some of the specified grounds concern the nationality and habitual residence of the child that the child was both the British national and habitually resident in England or that he was either a British national or habitually resident in England and had no such connection with the state in which the decision was given.[15] Further recognition may be refused in certain cases for want of a proper service of process want of competence of the authority making the foreign decision in the absence of the defendant and in compatibility with certain other decisions on the custody of the child.[16] Another ground is that the effects of the decision are manifest ably incompatible with the fundamental principle of the law of England relating to the family and children.[17] It has been suggested that these fundamental principles are to be identified with Section 1 of Children Act 1989, the danger is that so much identification might encourages English judges to review the merits of every foreign decision by reference to the welfare principle enshrined in that section with out given sufficient weight to Article 9(3) of the Convention which declares that no circumstances may the foreign decision be reviewed as to its substance. A final and perhaps most important ground is that it is found after the child views were practicable[18], that by reason of change in circumstances included the passage of time but not included the mere change in the residence of the child after the improper removal the effect of the original decision are manifestly no longer in accordance to welfare of the child.[19]

Decision of rights access including provisions as to access in decision relating to custody, are recognized and enforced on the same conditions as custody decisions, some flexibility is allowed however, and the competent authority of the state addressed may fix the condition for implementation of the exercise of the right to access taking into account in particular under taking given by the parties on this matter. The central authority of the state addressed may seek from the competent authorities in that country a decision is to access even if recognition and enforcement of the custody decision is refused.[20]

(b) The Hague Convention:

A convention on the civil aspects of International Child Abduction was prepared under the auspices of Hague conferences on private International law and signed on October 25,1980.Part I of the Child Abduction And Custody Act 1985 gives effect to this convention, which is wider than European convention not only in geographical scope but in dealing with custody rights arising in another contracting state by operation of law or by reason of an agreement having legal effect as well with custody decisions of judicial or administrative authorities.[21] The convention imposes obligation up on contracting state and requires the appointment of central authorities through which applications are made a view to invoking these obligations. The obligations arise in case of wrong full removal or retention of child in breach of right of custody. The rights of the custody with which the convention is concerned include rights relating to the care of the person of the child and in particular to right to determine the child place of residence this will include for example the right of parent who does not have custody of a child to give or refuse consent to removal of the child from the jurisdiction by custodian parent.[22] These right may be attributed to a person, an institution or any body (include a court in cases in where the child has been made a ward court or where the court is currently seized of a custody dispute concerning the child). Either jointly or alone and must custody under the law of the state in which the child was habitually resident immediately before the removal or retention where those rights were actually exercised at the time of removal or retention (or would have been but for the removal or retention).[23] The reference to rights held jointly important in most countries parent will be joint custodian of the child in the absence of any order or agreement to the country, and either will be able to take steps under the convention in respect of wrongful removal or retention of the child by the other. The convention refers to "wrong full removal" or "wrong full retention" meaning in each case of removal or retention out of the jurisdiction of the courts of the states of the child habitual residence. The contact between the two phrases is between an act of removal which at once breaches custody rights and a keeping of the child which only breaches those rights when it is continued beyond the limit of

law full ness in terms of time a typical example of wrong full retention occurs when a child is not returned after an agreed period of access. In each case the removal or retention is event which occurs one and for all on a specific occasion for the purpose of the convention, retention is not a continuing state of affairs but some thing which occurs when the child should have been returns to its custodians, or when the persons with rights of custody refused to agree to an extension of a child to stay in a place other than that of its habitual residence. Although a removal or retention may be wrong full whether or not international boundaries are crossed, the convention procedure will only become available if and when then occur. Removal and Retention are exclusive concepts. It is impossible to overlap or for either of them to follow the other in the same case. The central authority of the state where the child is on receiving the application for the return of the child either directly from a person institution or body concerned or from another central authority, must take or cause to be taken all appropriate measures in order to contain the voluntary return of the child, failing amicable settlement it must initiate, or facilitate the institution of proceeding with a view to obtaining a order for the return of the child. The competent authorities are to act expeditiously in such proceedings and where that has been wrong full removal or retention must order the return of the child for with, unless certain grounds for refusal are made out.

A number of grounds for refusal are available in cases where the application is made from the one year of wrong full removal or retention. The first is that the person, institution or body concerned was not actually excising the custody rights at the time of removal or retention, and had consented to or subsequently acquiesced in the removal of retention. Acquiescence can be active by express words and conduct inconsistence with an intention to insist on right of custody or passive when there is a lapse of time in such duration as to amount to acquiescence in all the circumstances even express words will not amount to acquiescence where they are spoken without knowledge of the possibility of the right being enforced. But awareness in general terms will suffice, and there is no need to show that the parties concern was aware of for example the expeditious and effective

enforcement machinery by provided by the Convention. A single statement satisfying these requirements may amount to acquiescence even if it is retracted a short time later. The second is that there is a grave risk that the child returns with exposed him to physical or psychological harm or other wise place the child in an intolerable situation. The court have to recognized that some psychological harm to the child may be inherent in the very conflict which is before the court or might normally to be expected to occur on the transfer of the child from one parent to another .The convention envisages more substantial harm severe degree of harm, hinted at by the later reference to the child being other wise in an intolerable situation.[24]

A final ground for refusal in this type of case is that the child objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take account of his views. The expressed wishes of the child are not binding on the court which must decide what weight to give to them in the light of the other facts of the case. Where an application for the return of a child is made after the passage of one year from the date of wrong full removal or retention return may also be refused if it is demonstrated that the child is now settled in his new environment.[25]

The Hague Convention lays down that, when a court has jurisdiction over a child, the first question to determine whether the Hague Convention applies to the case. Two conditions must be satisfied before the Convention applies:

- The child must be under 16 years of age, and
- The child must have been habitually resident in a Convention country immediately before any breach of custody or access rights.

The Hague Convention is expressly intended to enhance the international recognition of rights of custody and access arising in the place of habitual residence, and to ensure that any child wrongfully removed or retained from that place is promptly returned (Article1). In most cases, therefore, the court obligation to Act in the best interests of the Child is displaced as a consideration bearing on

who is to have care or control of the child. The Hague Convention creates central authorities throughout the Convention countries to trace an unlawfully removed child and secure its return. It is the important to consider what principles and rules determine whether a child is or is not to be returned to a Convention country mandates return of the child only when there has been a wrongful removal or retention of the a child from a Convention country (Article12). In securing rights of access, the following issues should be considered:

- Wrongful removal or retention;
- Excusable removal or retention; and
- Access

Regarding wrongful removal or retention Article3 of The Hague Convention provides that removal or retention of a child is wrongful where it is in breach of rights of custody and at the time of removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention. Removal occurs when a child is taken out of the place of habitual residence, where as retention occurs when a child who has, for a limited period, been outside the place of habitual residence is not, on the expiration of the period, returned. It is not the removal or retention of the child from the parent which constitute breach of Article3 but the removal or retention from the place of habitual residence that creates the wrong. It is important to identify the event constituting the removal or retention because of an application made within one year of such removal or retention, the court must order the return of the child, whereas if this is done after one year, the court must also order the return of the child unless it is satisfied that the child has settled into its new environment.

Regarding the excusable removal or retention there are some grounds which enables the removal or retention to be excused. (i) Applicant not exercising custodial rights. (ii) The order for the returned of the child can be refused if the applicant had consented to or subsequently acquiesced in the removal or retention. (iii) Risk to the child the court may refuse a returned if there is a grave risk that the returned of the child to the country in which it habitually resided immediately

before the removal or retention would expose the child physical or psychological harm or otherwise place the child in an intolerable situation. (iv) The court may refuse to order returned, if a child objects to return. (v) The court may refuse to order returned if it would be contrary to the protection of human rights and fundamental freedom. (vi) The application for returned was made more than one year after a wrongful removal or retention and the child settled into its new environment.

Regarding the Access of the child the Hague Convention does not give rights of access either the importance or attention but it devotes to rights of custody. The Hague Convention does not impose any specific duty on a court in a Convention country in Relation to rights of access and it therefore, appears that the question of access should therefore decided with reference to the best interest of the child as a paramount consideration.[26]

(E) RECOGNITION OF FOREIGN JUDGEMENTS

The custody of the child and his/her upbringing is not affected by the domicile or nationality of the parties, but is governed wholly by the law of England. English court will apply English Law on questions of custody even if the child is domiciled abroad or is the national of a foreign country or ordinary resident outside the country. The paramount consideration in English Law is the welfare of the child and this rule applies in all cases, not only between parents but between parents and strangers, and between strangers.[27] The High Court in England has an inherent jurisdiction as to children to make any order, other than an order appointing a guardian, or an order as to the care or education of, or contact with, the child if, when the proceedings are commenced, the child is a British subject or is ordinarily resident or present in England. In these circumstances, the court may also appoint a guardian. The power to appoint a guardian in such cases is discretionary, and the court will exercise it sparingly if the child is not in England, or has been brought here by 'kidnapping it', that is removing it from another jurisdiction by force or stealth.[28] Under English law, a foreign court would be regarded as having jurisdiction to appoint a guardian of a child who is a

national of that country, or domiciled there, or ordinarily resident there or present there; and such orders would be recognized in England, and a guardian appointed in such cases would have the same powers as a foreign parent.[29]

Thus the law of custody of child is regulated by part I of the Family Law Act 1986, which was based upon recommendation of English and Scottish Law Commissions. The Act does not however deal with the guardianship or with the inherent jurisdiction outside the field of care and control. These remain governed by common law principles. Custody is usually awarded in a suit for divorce if one party is domicile in the state which grants divorce, and the child is outside the state of the domicile of the other parent, the custody can not be awarded, unless the non-resident parent appears. If both are domiciled in the state at the beginning of the divorce suit, the court has jurisdiction, it would seem, to award custody although one parent has changed the domicile of himself and the child, pending the appeal; jurisdiction once having attached will not be divested. If after a divorce the party to whom custody was given removes with the child to another state, this would seem to give the second state jurisdiction over the custody and put an end to the jurisdiction of the first state, for after the divorce each party may change domicile at will and the child's domicile changes with that of the parent in whose custody he has been placed.

When the custody of a child has been awarded to one parent by a court having jurisdiction so to do, the right of this parent will be recognized by other states. The facts upon which the award was based have become resjudicata, and can not be re-examined in the second state. But this estoppel extends only to conditions which existed at the time of the original decree; the second court may examine any facts which have occurred since the original decree which throw light upon the fitness of the parents to have custody of the child. It has been seen that a parent to whom custody of a child has been awarded often takes the child into another state and there establishes a new domicile. If the court allows a child to be taken out of the state, it may require the parent to give a bond to return the child at the end of a fixed time, an order of the court; but this will not usually be required.

The award of custody to the mother does not affect the obligation of the father, in the state where the child is domiciled with the mother, to support the child.

Therefore, here it is observed that in case of 'Taking child into another state' also father cannot absolve to perform his obligation. He has duty to support or maintain his child. English courts are now facing good number of kidnapping cases, where the children are removed out of jurisdiction. The modern trend appears to be to assume jurisdiction and make a summary order to retrieve the child to the jurisdiction from which he has come. Thus, in *ReL (Minors)*[30], it was observed "to take a child from his native land, to remove him to another country where, may be his native tongue, is not spoken, to divorce him from the social customs and contracts to which he has become accustomed in his native land and which are likely to disturb the child psychologically, particularly at a time when his family life is also disrupted. It would be better for the child that those merits should be investigated in a court in his native country then that he should spend in another country the period which must necessarily lapse before all the evidence can be assembled for adjudication here.

Another important case relating to foreign judgment custody order is *Mekee vs Mekkee*[31], where a husband and wife, both were Americans. After separation they entered into a written agreement about the custody. It was agreed that the infant son would not be removed out of the U.S.A. without permission. A court in California pronounced a decree of divorce at the instance of the husband and custody of the child was awarded to the wife. The husband removed the minor to Ontario with the knowledge of the wife. The court in Ontario awarded custody of the minor to the husband but the decision was reversed by the Supreme Court of Canada. In appeal, Lord Simonds of the Privy Council restoring the order of the court in Ontario, observed, "To this paramount consideration (of the infant's welfare) all other yield the order of a foreign court of competent jurisdiction is no exception to an order providing for custody of an infant cannot in its nature be final."[32]

The other important case relating to foreign judgment relating to taking the child into another state is *Re H (in fant)*. Where A, born in Scotland & married an American Service man in America and went to live with him in the U.S.A. Two children were born to them and the marriage was subsequently dissolved 'A', then married H, an American Citizen, domiciled in America, who was married before but has no children. The custody proceedings were regarding their two children. Their marriage dissolved by a Maxican court on the ground of incompatibility of temperament. The decree provided that the children should be in the children should be in the custody of mother. The Supreme Court of New York ordered that the boys should be maintained in the wife's apartment in New York and they should not be removed out without prior written consent of the father, in defence of the order, the wife took the children to England. The New York court ordered the children to be returned to New York. The court of appeal passed an order in favors of the father. Cross J. observed that "the court has to be satisfied before it sends the child back, that the child will come to no harm".

In *Re. L* (minors)[33] the Court of appeal was concerned with the custody of the foreign children who were removed from foreign jurisdiction by one parent. That was a case where a German national domiciled and resident in Germany married an English woman. Their matrimonial home was in Germany and the two children were born out of the wedlock and brought up in Germany. The lady became unhappy in her married life and in August, 1972, she brought her children to England with an intention of permanently establishing herself and the children in England. She obtained residential employment in the school in England and the children were accommodated at the school. The children not having returned to Germany, the father came to England to find them. On October 25, 1972, the mother issued an originating summons making them wards of court. The trial court observed found that the children should be brought up by their mother and treating the case as a 'kidnapping' class of case, approached the matter by observing that in such a case where the children were foreign children, who had moved in a foreign home, their life should continue in what were their natural surroundings, unless it appeared to trial court that it would be harmful to the children if they were

returned. "The trial court observed that in view of the arrangements which their father could make for them, the children would not be harmed by being returned. He, accordingly, ordered that they should be returned to Germany and should remain in their father's custody until further order. The mother appealed, contending that in every case the welfare of the child was the first and paramount consideration and that the welfare of the children would be best served by staying with their mother in England. Buckley, LJ in his detailed consideration of the matter, wherein he referred to the decisions and few other decisions as well, held as follows:

"Where the court has embarked on a full-scale investigation of the facts, the applicable principles, in my view, do not differ from those which apply to any other ward ship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, and may be a circumstance of great weight; the weight to be attributed to it must depend on the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the 'kidnapper' the child should remain in his or her care or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed". Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment apply, but the decision must be justified on somewhat different grounds. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can create\develop in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child".

Regarding the Non-Residential Indian child custody matters Law Commission of India in its 219 report recommended and suggested that the jurisdiction assumed by the foreign court as well as the ground on which the relief is granted must be in accordance with the matrimonial Law under which the parties are married. The exception to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married,(ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on the ground available under the matrimonial Law under which the parties are married;(iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provision of the matrimonial Law of the parties. The efforts and rule with its stated exceptions has the merits of being just and equitable. It does no injustice to any of the parties. The parties do or ought to know their rights and obligations where they marry under the particular Law. They can not be heard to make a grievance about it later or allowed to bypass it by subterfuges. The rules also had an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the private international Law of the different countries with regard the jurisdiction and merits based variously on domicile, nationality, residence-permanent or temporary or *ad hoc*, forum, proper law etc. and ensuring certainty in the most vital field of national life and conformity with the public policy. The needs take of modern life and makes due allowances to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband and it is the husband's domiciliary Law which determines the jurisdiction and judges the merits of the case.

The Law Commission regarding the NRI child's custody has suggested that some composite legislation is enacted to deal with the problem of non-resident

Indian to avoid them from importing judgment from foreign court to India for implementation of their rights. Till this is done foreign court judgments in domestic matters will keep cropping up and court in India will continue with their salutary efforts in interpreting in harmony with the Indian Laws and doing substantial justice to parties in the most fair and equitable way. However, in this process, the Indian judiciary has made one thing very clear i.e. the Indian curt will not simply mechanically enforce judgment and decrees of foreign matters. The Indian have now started looking into the merits of the matters and deciding then on the consideration of the Indian Law in the best interest of the parties rather than simply implementing the orders without examining them. Further Law commission suggested that wherever one of the spouses is an NRI parallel additions must be made in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 to provide for provision for maintenance and alimony of the spouses child custody and child support. This will ensure that the children on Indian soil are maintained and provided with the income and standard of the NRI spouses in the foreign jurisdiction. It may also be worthwhile to suggest that under section of The Family Courts Act, 1984, the respective state governments where family have not been established should be directed to provide for family court. It is also suggested a core committee of specialist in the field of private inter national Law should be constituted at the earliest to prepare a comprehensive draft to suggest the said changes in legislation in the best possible way.[34]

(F) ROLE OF JUDICIARY

India not being a signatory to the Hague Convention of 1980 on the Civil Aspects of International Child Abduction, Questions regarding the custody of such children are now considered by the Indian Courts on the merits of each case bearing the welfare of the child to be of paramount importance while considering the order made by the foreign Court to be only one of the relevant factors in such decision.

In *Marggarate Pulparampil Vs Dr. Chacko Pulparampil*[35], Kerela High court considered the pertinent Question of children custody in NRI marriages. In this

judgment the court has recognized the "real and substantial connection, to establish the court's jurisdiction in custody issues". where the brief facts of the case as an Indian National married as per the ecclesiastical rites, with a German lady two children were born to them then matrimonial differences cropped up and husband filed a petition in German court for seeking access to the children who were with the mother. Then the parties mutually agreed regarding access. In the mean time, the wife divorced petition was dismissed by German Court. The wife appealed from that order and while that appeal was pending on the application of the mother/wife, the father was ordered by the German Court to pay maintenance to the children. Soon after, the father took out the children one day but instead of returning them to the mother in the evening, drove them in a taxi to the airport and took a plane for India for the children. The father did not inform the mother either about his departure nor did he cable her after reaching India. Then the mother moved a petition before the appellate court in Germany where the divorce matter was pending and obtained an order by which it was ordered that the father hand over the custody of the children to the mother. Nothing happen pursuant to this order and the mother continued to make enquiries about the whereabouts of the children. Sometimes later the appeal taken by the father from the order directing maintenance to the children was dismissed by a German Court as also and the wife's appeal from the divorce matter was allowed and the marriage was dissolved in the Germany. On the same day another order was passed by another German Court directing that the custody of the children given to the mother. When the wife came to India and filed Habeas *Corpus* petition in the Indian Court for the returned of her children. The High Court was convinced that the domicile of the father was India and mother was German. Even though according to the principles of Private International Law, the mother and the children in this case would have the father's domicile, and therefore the father, the mother, and the children were of Indian domicile and as per that rule Indian court would have jurisdiction, the court held that a competent German Court will have jurisdiction to pass the decree for divorce or custody of the children on the ground that the petitioning wife had a "real and substantial connection" with the country of that court and also the

children were ordinarily resident in that country. Further the court allowed the child to be moved back to the mother in Germany even though that meant allowing the child to be moved out of the Indian Courts jurisdiction, as the court felt that the interest of the child were of paramount consideration and in this case made it necessary to give the custody to the mother in Germany. The court has laid down the comprehensive safeguard for ensuring the parental rights of the father in India were not totally compromised in the process by passing a series of directions to balance conflicting interests among the parties. The karalla High Court observed:

(i) The petitioner will execute a bond to this Court to produce the children whenever ordered by this Court to do so.

(ii) An undertaken from the German Consulate Authority in Madras that they will render all assistance possible for the implementations of any ordered passed by this court time to time within the framework of the German Law will be produced by the petitioner.

(iii) The petitioner will obtain an send a report from a Parish Priest within the perish in which they purpose to live every three months to this court given sufficient details about the children, their health and welfare and send a copy there of to the father.

(iv) The petitioner will inform the Registrar of this Court the address of her residence from time to time and any change of address will be immediately notified.

(v) She will not take the children outside West Germany without obtaining the previous order of this court excepting when they are brought to this country as directed in this order.

(vi) Once in three years , she must bring the children to this country for a minimum period of one month at her own expense at that time the father will have access to the children and terms and conditions to be directed by this Court when the children have reached t\this country. The three year's periods will be determined from the date on which the children are taken by the

mother from this country. They will be brought to India earlier as directed by the court at the instance of the father provide that it is not within a year from today, if the father is wiling to meet the expenses for the trip from Germany to India and back for the mother and children.

(vii) The father, if he is visiting Germany, will be allowed access to the children on terms and conditions as ordered by this Court on motion by the father intimating his desires to go and see the children and requesting for permission for access.

(viii) When the children are brought to India at the end of three years the whole question of custody may be reviewed suo motu by this court or at the instance of the father or mother and the present order maintained modified, altered or cancelled.

In *Elizabeth Dinshaw vs Arvand M. Dinshaw,*[36] when the wife had clandestinely taken away the children to India to his place even as the English Court had already an order all the children, custody in England. While the Supreme Court looked into all the relevant of the case to decide what was in the best interest of the children and ultimately directed the custody of the children to be given to the mother. Similarly in *Kuldeep Sidhu vs Chanan Singh*[37] the Punjab and Haryana High Court recognized that the best interest of the children is a paramount consideration in this case where the mother who was in Canada be allowed to take back the children from India to Canada where the mother continued to live in India with her parents the Canadian Court had awarded the custody to the mother. The Court further held that welfare of the children who were Canadian citizens would override any consented custody arrangement and the children have a right to be brought up in the culture and environment of the country of their birth. In *Atya Shamim vs Deputy Commissioner / Collector Delhi*[38] it was held that wherein a habeas corpus petition by a person who was not a citizen of India, to be maintainable to secure the custody of a minor

In *Dhanwanti Joshi vs Madhav Unde*[39] where NRI husband was already married to other women and during the subsistence of the earlier marriage had

married the second wife *Dhanwanti Joshi. Dhanwanti* had a son from him and when a child was just thirty five days old she left her husband and came to India with her infant son. The Supreme Court had decided a dispute of custody of the child when he was more than twelve years old and decided that even though the father may have obtained custody from the US Court the Supreme Court of the view that the best interests of the child demanded that the child be allowed to continue to stay with mother in India who had brought up the child single handedly in India, subject to visitation rights of the father. The court further held that the Court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the Foreign Court as only a factor to be taken into consideration unless the Court thinks it fit to exercise summary jurisdiction in the interest of the child and that its prompt return is for the child's welfare. Similarly in *Eugenia Archetti Abdullah vs State of Kerala*[40] upholding the right of the US citizen petitioner mother in a habeas corpus petition, the custody of the children was handed over to the mother after holding that the High Court can exercise jurisdiction under Article 226. In *Veena Kapoor vs Varinder Kumar Kapoor*[41] holding that in matters concerning the custody of minor children in a habeas corpus petition where parents are separated, the paramount consideration is the welfare of the minor and not the legal rights of the respective parties.

The Supreme Court hearing an appeal against a decision by the High Court in a habeas corpus petition *in Poonam Datta vs Krishanlal Datta and others,*[42] directed an arrangement to be maintained until either parties went in for an appropriate guardianship proceeding. Further the Apex Court in a habeas corpus petition in *Manju Tiwari vs Rajendra Tiwari*[43], directed that the custody of the child be given to the mother with visitation rights to the father who was at liberty to apply for custody of the child in appropriate guardianship proceeding.

The Supreme Court upholding the decision of the High Court in *Kumar Jahgirdar vs Chethana Ramatheertha*[44] in this case the Supreme Court had considered very vexed question regarding the effect of second marriage of mother

on the custody of children the Supreme Court came to the conclusion that a female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification in safeguarding interest of the child. The brief fact of the case are the wife after obtaining divorce on the mutual consent, the wife remarried to *Mr Anill kumble* a cricketer of National and International repute. The family Court of Banglore by judgment directed the custody of the child to the father and given the visitations rights to the mother but the High Court taken a different view and reversed the judgment of family Court the high Court directed that the mother should continue to retain exclusive custody of the child with visitation right to her former husband. The High Court concluded that in the absence of any compelling or adverse circumstances, the natural mother can not be deprived of the exclusive custody of a growing female child, the High Court further observed that female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification for it. The conclusion of the High Court aggrieved by the order of the High Court, the former husband applied before the Supreme Court. The Supreme Court observed that the conclusion of the High Court seems to be just and proper in safeguarding the interest of the child. The Supreme Court on the theory of paramount consideration of best safeguarding the interest of child, maintained the High Court judgment with certain modification for following reasons

(i) The child is, at present nine years of age and on advent of puberty. This is the age in which she requires more care and attention of the mother. Mother, at this age of the child deserves to continue to keep the custody of the female child. She is reported to have given up her service and now leading life of a house wife. The progress report of Aaruni(child) from the Sophia High School, Bangalore, indicates that she is very good at studies and has a bright educational career.

(ii) It is reported that the wife is presently on the family way. The prospect of arrival of the second child in the family of the wife is another circumstance which would be in favor of the present child.

(iii) The petitioner lives alone with his father. There are no female members living jointly with him although he may have female relations in the city but that would not ensure constant company,care and attention to the female child.

(iv) The petitioner/natural father is a busy stock broker allegedly carrying in his business with aid of on-line, he has not to remain out of residence for attending his office and other business engagements.

(v) The apprehension express against the second husband that he might poison the mind of the child and create ill-will towards natural father is not born out from the evidence on record. On the contrary,the second husband in his deposition has made statements evincing a very cooperative and humane attitude on his part toward the problem of the strange couple and the child. We find that apprehension express against the second husband is without foundation. The parent of the have separated by mutual consent without making any vicious allegation against each other. They also agreed under the express termed of the consent decree of divorce to take responsibility of bringing up their child as her joint guardians. This gesture of decency and cooperation in jointly looking after the child has to continue. In this mutual agreement of separated couple, on behalf of second husband, it is assured to us that he would continue too give his unreserved cooperation and help and would do nothing as to spoil the relation ship or intimacy of the child with the natural father.

(vi) The visitation rights given to the natural father, in the present circumstances,also do not require any modification because with the passage of time,the growing child should eagerly wait for the company of his father as a happy and enjoyable moment rather than treat it as a part of

empty ritual or duty. To make visitation rights of natural father effective and meaning full for proper growth of the child, active cooperation of both the parents and her step father is expected and we hope it would not be found wanting from any one of them.

(vii) Since the mother of the child is married to the famous cricketer, as and when she leaves the country on tour with her husband during school days or vacation period of the child without taking the child with her, instead of leaving the child to the care and custody of some other member of the family, the custody of the child during her absence from her home shall be given to the natural father. In this case the Supreme Court has given a wider interpretation of the *Theory of Best Interest* of the child and considered that the second marriage of the first wife is not a disqualification of the custody of the child. Now the pertinent question is whether the Supreme Court has considered all relevant circumstances to save guard the interest of the child or only relied on the status of the parent.

In *Radha @ Parimala vs N. Rangappa*[45], in this case the mother filed a petition for custody of the child. The respondent who is the father of the minor under section25 of the Guardian and Wards Act 1890 alleging that he married the appellant at kengapura village prevailing in the community from out of the wedlock the minor was born. The appellant (mother) left the matrimonial home without any justification and consent of the respondent and in his absence and without informing anyone else. Surprised by the sudden disappearance of the appellant from the matrimonial house, the respondent (father), the parents of the appellant and well-wisher of the respondent went in search of the appellant. They found the appellant in the company of her paramour one P. Ismail by name, who is an assistant master at Honganur in Channapatna Taluk living in adultery with him. Under the circumstances the respondent filed a case against his wife under section13 (i) of the Hindu Marriage Act for divorce. The appellant despite service of notice on her did not appear before the Court. In the circumstances the court

granted decree of divorce on the basis of the evidence adduced by the respondent. However after the disposal of respondent petition, the appellant has filed an application for setting aside the ex party decree. The Court below has given the custody of the minor to the father. Aggrieved by this order the mother appealed before the High Court. The Karnataka High Court after hearing both parties councils and evidence on record observed that "it is the prime duty of the Court to do all the acts and things necessary for the protection/welfare of minors for they can not take care of themselves. The expression 'welfare' in this context is to be understood in its widest sense and embraces not merely the martial and physical well-being and happiness of the minor but every circumstance and every factor bearing upon the moral/and religious welfare and the education and upbringing of the minor. In all matters relating to the custody and upbringing of the minor the primary and paramount consideration of the court must be the welfare of the minor. The word welfare of the child admits of no straight-jacket yard tick. It has many facets such as financial, educational, physical, moral and religious welfare. The question where the welfare of the minor lies should be answered after weighing and balancing all factors germane to the decision making, such as relationships, claims and wishes of parents, risk, choices and all other relevant circumstances. The answer lies in the balancing of these factors circumstances and determining what is best for the minor total well-being." The court further observed that the natural Guardian is entitled to have the custody of the minor child. Hence, the father as a natural guardian is entitled to the custody of the minor children though, in the case of girl, less than 5 years the mother has the right to custody of the minor by a reason of the proviso. Subject to the exception made in the proviso to clause (a) of section 6 the father has the preferential right of guardianship and custody of the minor children. But, it should be remembered that even the preferential right of the father as natural guardian should be subordinated to and even overridden by the sole consideration that the welfare of the minor is to be determinative, factor in all these matters of guardianship and custody. However, the controlling consideration governing the custody of minor children is the welfare of the children and not the right of the parties. The father right to the

custody of the minor children is neither an absolute nor an indefeasible one. The welfare of the child should be the paramount consideration. The mother can also be given the custody of the minors, if their welfare or interest should require it, even if the father is otherwise fit to act as guardian. In entrusting the custody of the minor child to one of the parents, the Court should take into account or relevant circumstances including social and religious environment of the family, the quality of immediate neighborhood and locality in which a particular parent resides, the financial position of the parties, education facilities for the minor concerned and all other circumstances and factors which are germane to the decision making. The Court is not so much concerned with the feeling of a particular parent as with the welfare of the minor. The High Court relied on *Smt. Mohni vs Virender Kumar,* and *Vegesina Venkata Narasaiah vs Chintalapati Peddi Raju (DB)*[46], *Sunil Kumar Chowdhary and Anr. vs Smt. Satirani Chowdhary.*

Therefore, from an overall reading of the above matters decided by different Indian Courts, it may be said that irrespective of any Foreign Court custody order, Indian Courts generally adjudicate matters of child removal by considering the best interest of the child as a paramount consideration for settling such issues.

The High Court of Bombay in *Mandy Jane Collins vs James Michael Collins*[47], when matrimonial dispute between a 62 years old American father and 39 years old British mother resident in Ireland and who were litigating over the custody of their 8 year old minor daughter said to be illegally detained in Goa by the father, the Court declining the issuance of a writ of habeas corpus held that the parties could pursue their remedies in normal civil proceedings in Goa. The Court dismissing the mother's plea for custody concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa is not possible and directed that status quo be observed. This in effect means that the 8 year old minor girl continues to live in Goa without her mother or any other female family member in the father's house. In a challenge to this decision by the mother before the Supreme Court of India, the appeal was dismissed on August 21, 2006, leaving it

open to the parties to move the appropriate forum for the custody of the child, which if done, was directed by the Supreme Court to be decided within a period of three months with earlier visitation rights continuing to the mother. In another matter reported as *Ranbir Singh vs Satinder Kaur Mann*[48], the Punjab and Haryana High Court declined to issue a Writ of Habeas Corpus to the petitioner father residing in Malaysia who was seeking release of his five year old son and three year old daughter from their mother's custody in India. The High Court of Malaya at Kuala Lumpur had held that the petitioner was entitled to the legal guardianship of the said minor children. However, The High Court in India declining to enforce the foreign judgment of the Malaysian High Court held that the matter can be reagitated before the appropriate forum with regard to the custody of the children on the basis of evidence to be adduced by parties. The Habeas Corpus petition was dismissed with the observation that it would be open to either parties to move for custody of the minor children under appropriate law before an appropriate forum.

In a recent judgment of the *Supreme Court of India* delivered on May 13, 2011 in the case of *Ruchi Majoo vs Sanjeev Majoo*,[49] a two-judge bench consisting of *Justices V.S. Sirpurkar* and *T.S. Thakur*, held that in cases concerning the custody of a child removed by its parent from a foreign country to India, Indian courts can retain jurisdiction to consider and determine custody, notwithstanding that such removal of the child (from where the parties had set up the matrimonial home) may be in contravention of the orders of the foreign court. Thus, jurisdiction of Indian courts is not ousted in cross-border child custody cases that involve parties who are foreign citizens or where there are prior decrees by a foreign court on the issue of custody. The *Court* further held that since the interests and welfare of the child were paramount, custody orders issued by foreign courts are not to be taken as conclusive and binding, but only as one of the factors for consideration that would go into the making of a final decision by an Indian court.

It has been widely argued that the *Supreme Court's* decision in *Majoo* gave credence to the observation made by the *U.S. Government* and renders India as a 'safe haven' for international parental child abduction. Recent statistics for the past

decade made available by the governments of the United Kingdom and the United States of America, both being countries that have a large Non-Resident Indian population, indicate a sharp rise in parental child abduction to India in defiance of the resident country's courts' orders.

There is no denying that a parent's act of unilaterally uprooting a child from her habitual residence and thereby preventing her access to the other parent can prove to be a traumatic experience for the child, with potentially deleterious effects on her psychological and sociological well-being. While the doctrine of "*welfare of the child*" is long-settled in Indian jurisprudence and has been actively applied and evolved in various cases by the Indian courts, there is no domestic legislative framework dealing specifically with parental child abduction. In India, parental child abduction, that is, the removal of a child from the matrimonial home by one of its parents without the consent of the other parent and without any custody order made by an Indian court is not recognized as a crime. By extension, international parental child abduction or the removal of a child by its parent to or outside of India is also not a statutorily defined crime within India.

In the absence of any domestic laws, together with the non-ratification of the Convention, Indian courts have dealt with cases of parental child abduction as *civil* custodial disputes. Typically, such cases have been instituted in the courts either by way of writ petitions in the nature of *habeas corpus* under *Article 32* (before the *Supreme Court*) or *Article 226* (before a high court) of the *Constitution*, or, as applications for custody under the *Guardians and Wards Act, 1890*. Once seized of the matter, the court invokes the doctrine of *parens patriae* (Latin for 'parent in nation') so as to employ the principle of "*welfare of the child*" which is equivalent to the concept of "*best interests of the child*" endorsed in most common law jurisdictions and in the *Convention*. However, given the complete lack of a legislative framework in the context of parental child abduction, the courts exercise very wide discretion in applying the 'welfare' doctrine to the particular fact situations The *Supreme Court's* judgment in the *Ruchi Majoo case* amply demonstrates this point. It must be stated at the outset that the *Ruchi Majoo case*

raises several questions ranging from the jurisprudence on recognition of foreign decrees in India, issues of custody involving the children of foreign citizens, to the distinction between the court's powers under its writ jurisdiction and under specific legislations concerning the custody and guardianship of children.[50] Regarding the visitation rights of the minor the Supreme Court observed that the minor has been thoroughly antagonized against the respondent- father. He held him responsible for his inability to travel to Malaysia with his grant parent because if he does so, both the mother and her parent will be arrested on the charge of abduction of the minor. He also held the respondent responsible for his grant parent's skin problems and other worries. He wanted to stay only in India and wanted to be left alone by respondent. He was reluctantly agreeable to meeting and associating with the respondent provided the respondent has the red corner notice withdrawn so that he and his grant parent can travel abroad. The Court further observed that it is in that view important for the child's healthy growth that we grant to the father visitation rights; that will enable the two to stay in touch and share moments of joy, learning and happiness with each other. Since, the respondent is living in another continent such contact can not be for obvious reason as frequent as it may have been if they were in the same city. But, the forbidden distance that separates the two would get reduce thanks to the modern technology in tally communication. The Court also observed that the father shall be free to visit the minor in India at any time of the year and meet him for two hours on a daily basis, unhindered by any impediment from the mother or her parent or anyone else for that matter. The place where the meeting can take place shall be indicated by the trial Court after verifying the convenience in this regard. The trial Court shall pass the necessary orders in this regard without delay and without permitting any dilatory tactics in the matter. For the vacation in summer, spring and winter the respondent shall be allowed to take the minor with him for night stay for a period of one weak. The above directions are subject to the condition that the respondent does not remove the child from the jurisdiction of this court pending final disposal of the application for grant of custody by the Guardian and Wards Court. The Court clear that within the board parameters of the

direction regarding visitation rights of the respondent, the party shall be free to seek further directions from the Court seized of the guardianship proceedings ; to take care of any difficulties that may arise to the actual implementation of this order.

It is in this context that the brief analysis of the *Ruchi Majoo case* examines and how far the *Court's* exercise of its wide discretion is effective in safeguarding the child's interests in the absence of any formal laws and rights.

The *Ruchi Majoo case* concerned an NRI couple that was settled in the U.S.A. The appellant-wife left the U.S.A. to return to India with their son. Meanwhile, her estranged husband filed a suit in an American court claiming that his wife had abducted the child. The American court issued a 'red corner notice' against the wife and directed her to return with the child to the U.S.A. The appellant-wife in India moved the *Guardian Court* at Delhi, by way of an application under the GAWA, seeking the right of custody of her son. The court allowed her petition and granted her custody. The respondent-husband appealed this custody order before the *Delhi High Court.* The *Delhi High Court* allowed the appeal and set aside the lower court's custody order on the basis that the Delhi court had no jurisdiction in the matter since the parents and the child were American citizens and the child was not 'ordinarily resident' in India, as is requisite under Guardians and Wards Act, 1890, for an Indian court to grant a custody order. The *High Court* further held that since an American court had already issued an order in the matter, all issues relating to custody needed to be agitated before the appropriate courts in the U.S.A. On appeal, the *Supreme Court* set aside the judgment of the *Delhi High Court,* holding *inter alia* that the Guardian Court in Delhi had the jurisdiction and competence to determine custody in this matter. It further ordered interim custody of the child with the appellant-mother during the pendency of the proceedings before the *Delhi Guardian Court,* and also ordered visitation rights in favor of the respondent-father.

In arriving at its decision, the *Supreme Court* culled out three questions for determination:

(i) Whether the high court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same;

(ii) Whether the high court was right in declining the exercise of jurisdiction on the principle of comity of courts; and

(iii) Whether the order granting interim custody to the mother of the minor calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

In answering the first question the court observed that in affirming the jurisdiction of the *Delhi Court* to entertain the petition for the guardianship or custody of the minor child, the *Court* construed the term 'ordinarily resides' as provided under *Section 9* of the Guardians and Wards Act, 1890. *Section 9(1)* states: (i) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having Jurisdiction in the place where the minor *ordinarily resides.*"

The *Court* held that that in law as well as in the instant facts, the question as to whether one is ordinarily resident in a place depends not only on the simple fact of residence but also on the intention to make that place one's ordinary abode or place of habitual residence. The court noted that the child was studying and residing in Delhi for the past three years and that the mother intended to pursue her profession in Delhi. E-mails produced by her as evidence indicated that the father of the child was a party to this arrangement. On these facts, the *Court* concluded that the child was 'ordinarily resident' in Delhi such that the *Guardian judge* in Delhi had the jurisdiction and competence to decide the custody rights. In respect of the law, the *Court* placed reliance on various decisions to support its purposive interpretation of the rule under *Section 9* of the GAWA. The *Court's* interpretation of 'ordinary residence' by delving into the factual background merits a more detailed analysis in terms of the principles of statutory interpretation, which this article will not undertake.

What is clear though, in my opinion, is that even when confronted with the 'threshold' of preliminary legal argument of jurisdiction as statutorily provided for under the GAWA, the *Court*, by conducting a detailed enquiry and taking the entire factual context into account, was working within the framework of the 'welfare doctrine'

(ii) In answering the second question, the *Court* explicitly invoked the doctrine of *"welfare of the child"* to hold that the jurisdiction of an Indian court cannot be declined solely on the basis of the principle of *"comity of courts"*. The *Court*, speaking through *Justice T.S. Thakur*, observed:

> "Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, Courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Criminal Procedure, 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its *parens patriae* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision."

The *Court's* decision in *Majoo* clearly evinces a breakaway from the stricter adherence to jurisdiction as laid down by the *Supreme Court* in its earlier decision in *Srimati Surinder Kaur Sandhu vs Harbax Singh Sandhu and Another*. The point to note is that in both these cases the legal issue of jurisdiction (in relation to the principle of judicial comity) is contextualized by invoking the 'welfare doctrine', albeit with contrasting results. Where the Supreme Court award the custody of

child to wife who was still in England, the husband had taken away the children to India to his parent place even as the English Court had already passed an order on the children custody in England. The Court looked into all the relevant facts of the case to decide what was in the best interest of the children the Court observed that "the modern theory of conflict of Laws recognizes and in any event, prefers the jurisdiction of the state which has intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstances as to where the child, whose is an issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another state in such circumstances will only result in encouraging forum-shopping". The court further held that the provisions of the Hindu Minority and Guardianship Act, 1956 cannot supersede the paramount consideration as what is conducive to the welfare of the child. Ultimately on the basis of the other observation court directed the custody of the children. The relevant passage in the *Sandhu case* is extracted below wherein the *Court*, speaking through *Chief Justice Y.V. Chandrachud* (as he then was), held as follows:

> Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offspring's of marriage. The spouses in this case had made England their home where this boy was born to them. *The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home.* The fact that the matrimonial home of the spouses was in England establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. The Supreme Court has relied on the US Court judgment in International *Shoe Company v State of Washington, 90L.Ed.95* which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) *It is our duty*

and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

These divergent views of the *Court*, of which *Ruchi Majoo* presently constitutes the authority, illustrate the uncertainty inherent in the *Court's* use of the 'welfare doctrine'. Here is where the *Court's* paternalistic approach must be reigned in, firstly, by urging a more thorough judicial understanding of the 'welfare doctrine', and secondly, legislating clear parameters for the judicial use of the 'welfare doctrine'. Although the 'welfare doctrine' is invoked by the *Court* in *Ruchi Majoo* numerous times, in particular, to establish jurisdiction and to subordinate the principle of judicial comity, there is very little analysis of the 'welfare doctrine' itself and in relation to these legal concepts in the context of cross-border custody disputes.

Surely, the best interests of the child would be truly affected and served if the issue of custody is determined by the court of the jurisdiction in which the family, including the child, is habitually resident and rooted in, unless there are compelling reasons otherwise. The *Convention* recognizes the importance of the principle of 'comity of courts' by way of legal reciprocity, under which the rights of custody granted under the law of one contracting state are respected and upheld in the other contracting states. It seeks to preserve the *status quo* in terms of the child-custody arrangement that existed immediately prior to an alleged wrongful removal or retention, thereby deterring a parent from crossing international boundaries to 'forum-shop' in an attempt to gain custody of the child. It nevertheless accords priority to the "*best interests and welfare*" of the child, which remains the overriding factor in the determination of custody arrangements and informs both parents' rights of custody of or access to, or both, the child. This is evident in the *Convention* itself which allows an exception to the rule of safe return of the child where it can be demonstrated to the relevant court or authority that if returned, the child would be exposed to "physical or psychological harm, or otherwise place[d]...in an intolerable situation". Thus, while judicial discretion is fundamentally embedded in the *Convention*, the well-defined parameters within

which the courts may exercise their judicial discretion allow for consistency in practice, greater legal certainty, and a more efficient and systematized global network that effects parental and children's rights. In the Indian context, domestic legislation can be modeled on the lines of the *Convention*, pending India's ratification. The need for a domestic legal framework, in my opinion, continues to be of utmost priority.

(iv) The third question before the court was visitation rights of the father and court observed that from the perspective of the *Court's* usage of the welfare doctrine, the *Ruchi Majoo* case is of particular interest, in that the *Court,* of its own accord, granted visitation rights to the father and laid down the basic modalities for the same. What is interesting is that the judges went on record to state that they engaged in "an interactive session" with the minor upon which they "concluded that the minor has been thoroughly antagonized against the respondent father". They record their opinion in this regard, as extracted hereunder:

> "For a boy so young in years, these and other expressions suggesting a deep rooted dislike for the father could arise only because of a constant hammering of negative feeling in him against his father. This approach and attitude on the part of the appellant or her parents can hardly be appreciated...
>
> "It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to face the realities of life be undermined. It is in that view important for the child's healthy growth that we grant to the father visitation rights; that will enable the two to stay in touch and share moments of joy, learning and happiness with each other."

It is submitted that in striving to pursue the best interests of the child, the judges have formed their own subjective views based on their meeting with the child (and on an aside, there is no mention of the presence, if at all, of a child specialist during this meeting) and employing common-sense notions of what constitutes good parenting. Thus, while they note the importance of the father's

presence in the child's life, and rightly so, any parental rights that the father may have in respect of his son, or in relation to the mother, or both, merit no mention.

From the above discussion it is conclude that the 'welfare doctrine' can and should be employed by the courts in a way that enables a clear recognition of the rights of the child, as well as its parents. This is best effected by a instituting a framework of laws. In the interim, the judges, in their unique position to powerfully impact as also best serve the needs of a child and its family must lay down clear, guiding principles for the application of the welfare doctrine, along with applying it to specific circumstances. But the most urgent need of time is to evolve a concrete domestic framework of laws dealing with the issues of child custody in NRI case.

It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above.

After analyzing the principle of jurisdiction of court and recognition of foreign judgments and role of Indian judiciary the researcher has made an opinion that the child's interest is supreme.

CONCLUSION

In conclusion we summed up that under English law and under Indian law both have given importance to the child welfare, the Indian courts while deciding cases pertaining to minor children have not followed a uniform pattern there also is an absence of progressive development in the subject. If some matters are decided with prime importance placed on the technicalities of various provisions of law and jurisdictional tiffs. The reason cited for this can be the absence of any law that governs this aspect. This only will affect the condition both physical and emotional of the child who is caught in the fire of shattered relationship. The recent decisions quoted above relating to child custody dispute agitated in the Supreme Court of India where a US Court declined the return of children to India despite the Supreme Court's directions shows that a time has now come for some international perspective in this regard. Situations also exist that whilst the parent in India

moves the Court and seeks *Habeas Corpus* relief, the parent with the child abroad moves the foreign Court there and gets a restraint order. Both parents get equipped with judicial orders and the bi-continental custody battle picks up in two jurisdictions.

In January 2005, the British government appointed Lord Justice Thorpe as Head of International Family Law in the UK judicial system for promoting development of international instruments and conventions in the field of family law with greater International judicial collaboration. Pakistan has signed a judicial protocol between the President of the Family Division of the High Court of London and the Chief Justice of the Supreme Court of Pakistan for cooperation between judicial authorities of the two countries on such issues.

Though the Indian Courts have rarely come across the problem relating to custody orders having international character, in all most all situations both for passing an order and for giving paramount consideration is given to the welfare nationality and ordinary residence are liberally construed if rigid adherence of rules would be harmful to the welfare of the child. On the whole a pragmatic approach is adopted by our court in handling child custody in matters. Thus in the larger interest of children at risk, the conflict of jurisdiction of Courts must take a back seat. It is therefore, the need of the hour that the Indian legislature may consider enacting some legislation to protect the rights of the abducted child to resolve the clash between the rule of domicile and the nationality rule. May be, till this is done, the Supreme Court of India could well lay down some uniform guidelines to be consistently followed in inter-parental child abduction from foreign jurisdictions. India cannot be promoted as a haven for parking removed children.

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Conclusion and Suggestions

CONCLUSION AND SUGGESSTIONS

In the present time child custody has taken the shape of great concern in matrimonial laws. Usually parents do take care, but the difficulty arises when the parents are separated or divorced. Both the parents feel natural affection for the child and want custody of their child.

Under Muslim law the concept of guardianship is distinct from the concept of custody. Muslim law entrusts hidana (custody) of children in their tender age to the mother and guardianship to the father during formative years of the child. In the event of the father being alive, he is the sole guardian of the person and property of the minor children. The right of hidana belongs to the mother and nothing can deprive her except her own misconduct. It is a right recognized solely in the interest of the children, but it is not an absolute right. This means that if at any time it is felt that in the circumstances of her life it would not be conducive to the physical, moral or intellectual welfare of the child to be kept in her custody, she can be deprived of it. The classical Hanafi Law, as practicised in India, recognizes the mother's custody until the son reaches 7yrs or a daughter's puberty where from the custody is transferred to the father. Thus mother's right to custody is qualified.

The Dharam Shastras did not deal with the concept of custody. The concept of custody under Hindu Law comes through the legislation. Therefore Hindu Law Regulated by the Guardian and Wards Act and Hindu Minority Guardianship Act 1956.Guardian And Wards Act 1890 is a secular Act. This Acts applies to other communities also like Christian and Parsi communities. Under the Guardian & Wards Act 1890, the superior right of the father in respect of guardianship was established. The position of the mother as a guardian of her children was of the second grade. Even the father could under old law nominate a guardian or his children so as to exclude the mother of the child orally or the process of the execution of deed. The mother had no power to appoint a testamentary guardian even if the father of the child had expired. The *Hindu Minority and Guardian Act* 1956 reiterates the traditional superiority of men and inferiority of women. The Kerala High Court established in the case of *Ram Chandra K.V. Annapurnu Ammal*[1] that section 6 of the Act 1956 the father is the natural guardian and it is only after him the mother can be the natural guardian. Only in the case of an illegitimate child, the mother is recognized as fully capable of looking after the child. The Act 1956 for the first time

confers on the mother of the child the right to appoint a guardian by will ignoring the testamentary guardian appointed by the father. The Act 1956 also lay down that the custody of the child up to the age of 5 years will be with the mother. The right to custody has been qualified by the word, 'ordinarily', which has raised the dilemma in the judiciary. In case of *Yasudevaan vs Viswalakshmi*[2] the mother was not given the custody of the child aged $2^{1/2}$ year despites the provision of proviso to sec 6(a) of Hindu Minority and Guardianship Act 1956. Thus it is manifested that a mother has been assignee statutory subservient position in the matter of the custody of her minor children. Under the Christian Law which is followed the *Guardians and Wards Act 1890. Indian Divorce Act* 1869 the Court has an unfettered discretion in making interim orders for the custody, maintenance and education of the child. Thus it is proved that the Act 1869 emphasizes the father's prerogative. The Parsi Law Section 49 of the *Parsi Marriage and Divorce Act* 1936 deals with Act 1956, claiming father's prerogative over mother, has now been watered down by the judicial activism regarding the section 13(1) of the Act 1956. Though Section 13(1) is specifically meant for guardianship and not for custody the courts have applied it to the disputed cases of custody of children under Section 26 of the Hindu Marriage Act 1955 considering that both guardianship and custody are interlocked concepts.

Thus it is observed that only Muslim law gives superior rights to the mother in matters of custody of child. No other religion gave this right to the mother. Under Hindu law as we have seen that old texts gave emphasis on father's superiority over his children. The concept of custody in Hindu law and other religions comes through legislation. Legislation also retains supremacy of father in all matters but recent legislation relating to Personal Laws (Amendment) Bill 2010 has changed this position. Now the mother and father have equal right in their children's' matters. According to the modern welfare theory all religious laws are subordinates to the child's interests. It is also submitted that our religious laws up to some extent give importance to the child's social, moral, ethical, economic and educational problems or interest of the child. The above are important matters of consideration in case of custody of a child.

Genesis of English and Indian law reflects that the legislative norms are made for the protection of child interest and gave to some extent equal rights to the mother. Legislative norms are not bound to follow the religious norms. Therefore all religious norms are subordinate to the legislative norms. The legislative norms in India and in

England try to follow or adopt to give importance to the child's social, moral, ethical, economic, educational problems.

The chapter relating to minor's custody of wife has highlighted the extremely harmful and traumatic effects of child marriage and child marriage below a certain age is blatant child abuse. The concrete statuary legislation exclusively dealing with social evil of child marriage is *Child Marriage Restraint Act*, 1929 but the same has been revamped and the Prohibition of Child Marriage Act, 2006 has been enacted. This Act also protect the social interest of minor married girl in such a way that section 6(C) of Hindu Minority and Guardianship Act 1956 impliedly repealed by this Act. After passing the Prohibition of Child Marriage Act 2006 the husband is not entitled to the custody of minor married girl/wife. The Madras High Court in *T-shiv Kumar case* and Delhi High Court in *Lajja Devi case.* These judgments clearly shows that after analyzing the ill affect of child marriage on child it would be not correct to entrust the custody of minor to the husband. If the Court award custody to the husband the object of the PCM Act will be defeated. These two judgments are the landmark judgments on the issue of minor married girl/wife. These judgments reflect that it is the interest of the children not the right of parent or husband is supreme.

Best Interest Theory of child theory reflects that the decisions of the Supreme Court endorse the proposition that in matters of custody of children, their welfare shall be the focal point. If the focus shifts from the rights of the contesting relatives to the welfare of the minor children, the consideration in determining the questions of balance of convenience also differs. Therefore, after analyzing the position of the mother and welfare of the child through judicial pronouncements it is observed that Supreme Court has in most of the cases followed its earlier decision i.e. *Smt. Surender Kaur Sandhu vs. Harbax Singh Kaur Sandhu*; and *Rosy Jacob Chakkrmal.* These above judgments are very important in relation to the custody of the child, where the Supreme Court held that Section 6 of the Hindu Minority and Guardianship Act 1956 cannot supersede the paramount consideration i.e. the welfare of the child, Judicial trends also support mother rather than the father. The Court always sees the welfare of the minor, all other consideration is subordinate to this. Therefore, after studying various statutes relating to the custody of a child under different legal systems, it is obvious that all laws are made for the welfare and protection of child's interest. Although there is urgent need to be made clear that court must make some guidelines to implement the concept of the best interest of the child. It is also necessary that the interest of children must not be limited to

their material need but has to be a quite comprehensive one, taking into its stride social, moral, aesthetic, and psycho-analytical norms pertaining to them. This doctrine should get reflected in all walks of life, especially in the case of gender justice and welfare of the female child to usher in the welfare of the society as a whole. The Law Commission of India reflected that the mother should have same and equal right vis-à-vis the father. Further it is also submitted that the statuary provisions are hesitant to confer the absolute right of custody to the mother's love and affection as well as the care for the health of the child is better rendered by the mother though the father can provide better direction so as to the course of education except in exceptional circumstances. So it is judiciary who should play the role of a realist judge. Thus welfare theory seems to be the dominant factor in ascertaining the interest of a child in the arena of modern welfare society. Indian courts have made the principle of best interest as the rule of court and try to follow it as efficiently a possible, but the concept itself being a relative one, it leaves a lot of scope for its misuse. The interest of a child cannot be crystallized in concrete terms, so the welfare of children gets glossed over which needs to be arrested, order to achieve the welfare of child in letter and spirit.

It is well settled that main consideration of the court while awarding the custody of the child is to protect child`s economic/educational interest. This also protected by legislative laws i.e.; Guardian and Wards Act 1890 Hindu Minority and Guardianship Act 1956, Prohibition of Child Marriage 2006 these Acts and judicial attitude also protects the child`s interest.

Regarding the NRI child's custody, it can be observed that the Indian courts while deciding cases pertaining to minor children have not followed a uniform pattern. There also is an absence of progressive development in the subject. If some matters are decided with prime importance placed on the technicalities of various provisions of law and jurisdictional tiffs. The reason cited for this can be the absence of any law that governs this aspect. This only will affect both the physical and emotional condition of the child who is caught in the fire of shattered relationship.[3] This situation only shows that the time has come for some International perspective in this regard. The fact of India not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction may have a negative influence on a foreign judge who is deciding on the custody of a child without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin. The foreign judge may be reluctant to give permission for the child to travel to India. As a logical upshot, India should become a

signatory to the Hague Convention and this will in turn, bring the prospect of achieving the return to India of the children have their homes in India.[4] Though the Indian Courts have rarely come across the problem relating to custody orders having international character, in almost all situations both for passing an order and for giving paramount consideration are given to the welfare nationality and ordinary residence are liberally construed if rigid adherence of rules would be harmful to the welfare of the child. On the whole a pragmatic approach is adopted by our Court in handling child custody matters.

SUGGESTIONS

It is suggested that:

(1) Religious principles be made with suitable fine tuning to achieve the social, moral, ethical, educational and economic interest of the child.

(2) Law should be made to achieve the child's social, moral, ethical, economic and educational interest as well as provide the equality of status of the mother vis a vis the father. There is need to some change in the Act of 1956 and follow the recommendation of 133rd Law Commission Report which allows the mother to have the custody of minor till the age of Twelve years and the above Act should be amended on the same pattern like Personal Law (Amendment) Bill 2010 which gave equal status to the mother in child custody cases.

(3) Judicial decisions should be based on welfare of minor child.

(4) The matrimonial court should continue to have jurisdiction on any matter regarding the child.

(5) The children should be treated as independent party and they should be represented separately.

(6) On adjudication of any matter relating to children, the matrimonial court should consider the wishes of the children, parents financial positions, suitability of the persons who claim the custody, age and sex of the child for deciding the welfare of the child.

(7) Access to children should be considered as complimentary to custody.

(8) The welfare principles projected in section 17 of the Guardian and Wards Acts 1890 needs to be spelt out for the simplicity of the judicial pronouncement. Regarding the protection of interest of the child the CRISP in India emphases on shared parenting because shared parenting can protect our cultural and family values and ultimately this would reduce divorce rates in the country.

(9) Give due consideration to the presence of a father in a child's upbringing not only

as a name but also as the natural guardian and also give father a fair chance to win custody cases without any prejudice. Father is for life, not just for conception.

(10) The Court must weigh to the social economic and education protection of child's interest.

(11) The Honorable Supreme Court need to emphasize on the need for a separate child welfare ministry separating it from the current clubbed scenario of women and child development ministry.

(12) Monitoring review and reforms of policies, programmers and laws to ensure protection of the girl child;

(13) India should also be a signatory to the International Hague Convention for honoring foreign courts' judgment in India.

(14) Define parental abduction as a heinous crime and prescribe strict punishment for it by describing it as a cognizable, non- boilable and non- compoundable offence.

(15) Ensure that NRI (Non Residential Indians) rights under laws of custody. An access of the laws of NRI country is respected in India.

(16) Orientation programme for judges of family course to be conducted by psychologist to sensitize them to child related issues.

(17) Special courts to be set up for child custody cases, so that spousal conflicts do not interfere in child matters.

(18) Child custody issues to be disposed of within six months of the date of application, or at least visitation be granted to the non custodian parents (fathers generally).

(19) Child interviews should be conducted for complex cases only after the child has been allowed to spend nearly equal and quality time with both the parents and such interviews be limited to adolescents only and then too the interview be viewed as a guiding evidence only and not a primary one.

(20) Children below the age of seven years should not be exposed to choice making between the parents as the process itself is cruelty to the child/children.

(21) If child access granted by courts are denied or subverted by the parent having the custody, strict actions must be taken and child access as granted should be ensured.

We hope the above recommendations will be best keeping in mind the interest of the child.

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